

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

<p>CRAIG FLEMING,</p> <p>Claimant,</p> <p>vs.</p> <p>GNA TRUCKING, LLC,</p> <p>Employer,</p> <p>FIRSTCOMP INSURANCE COMPANY,</p> <p>Insurance Carrier,</p> <p>Defendants.</p>	<p>File No. 19007252.01</p> <p>ARBITRATION DECISION</p> <p>Headnotes: 1803</p>
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## I. STATEMENT OF THE CASE.

Claimant Craig Fleming seeks workers' compensation benefits from the defendants, employer GNA Trucking, LLC (GNA) and insurance carrier FirstComp Insurance Company (FirstComp). The undersigned presided over an arbitration hearing held on January 25, 2023. Fleming participated personally and through attorney John Lawyer. The defendants participated by and through attorney Timothy W. Wegman. The case was fully submitted on February 27, 2023, with the filing of the parties' post-hearing briefs.

## II. ISSUES.

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

- 1) What is the nature and extent of permanent disability caused by the alleged injury under Iowa Code section 85.34?
- 2) What is the commencement date for permanent disability benefits under Iowa Code section 85.34?

- 3) Is Fleming entitled to recover the cost of an independent medical examination (IME) under Iowa Code section 85.39?
- 4) Is Fleming entitled to taxation of the costs against the defendants under Iowa Code section 86.40 and Iowa Administrative Code rule 876—4.33?

### **III. STIPULATIONS.**

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

- 1) An employer-employee relationship existed between Fleming and GNA at the time of the stipulated injury.
- 2) Fleming sustained an injury on December 9, 2019, which arose out of and in the course of his employment with GNA.
- 3) The alleged injury is a cause of temporary disability during a period of recovery, but Fleming's entitlement to temporary or healing period benefits is no longer in dispute.
- 4) The alleged injury is a cause of permanent disability.
- 5) At the time of the stipulated injury, Fleming:
  - a) Had gross earnings of \$926.54 per week.
  - b) Was married.
  - c) Was entitled to five exemptions.
- 6) From December 10, 2019, and continuing, the defendants paid to Fleming weekly compensation.

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

### **IV. FINDINGS OF FACT.**

The evidentiary record in this case consists of the following:

- Joint Exhibits JE-1 through JE-4;
- Claimant's Exhibits 1 through 2;
- Defendants' Exhibits A through D; and
- Hearing testimony by Fleming.

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

At the time of hearing, Fleming was 63 years of age. (Hrg. Tr. p. 31) Fleming earned his diploma from Abraham Lincoln High School in Des Moines, Iowa. (Hrg. Tr. p. 10) Fleming attended the Lincoln Technical Institute, an automotive school, and obtained a certificate. (Hrg. Tr. pp. 10–11) Fleming then enlisted in the Marine Corps where he worked as a mechanic. (Hrg. Tr. p. 11)

After Fleming's honorable discharge from the Marine Corps, he worked various warehouse jobs. (Hrg. Tr. p. 32) Fleming worked for a chemical company for a few years. (Hrg. Tr. p. 32) He worked at the Iowa State Fair, cooking in the grandstand, a couple of times. (Hrg. Tr. p. 32) Fleming also performed odd jobs. (Hrg. Tr. p. 33) It is more likely than not based on the totality of the evidence Fleming is physically unable to return to warehouse jobs, working for the chemical company, or performing odd jobs due to the work injury and the disability it caused.

Fleming worked at Liberty Hardwoods for about nine years. (Hrg. Tr. p. 12) He worked in the warehouse where he moved lumber by hand and using a forklift. (Hrg. Tr. p. 12) His job duties required operating a forklift, lifting, pushing, and pulling. (Hrg. Tr. p. 12) Fleming estimated he had to lift as much as seventy pounds in that job. (Hrg. Tr. p. 12) He credibly testified at hearing that he would be unable to perform the job due to the stipulated work injury and resulting disability limiting his physical ability to perform the job duties. (Hrg. Tr. pp. 12–13) The weight of the evidence establishes Fleming could not return to this job because of the functional limitations caused by the stipulated work injury.

Fleming next worked as a bus driver for about a year for Durham Schools, a company with which the Waukee Community School District contracted. (Hrg. Tr. p. 13) He drove a school bus for about a year, transporting children to and from school. (Hrg. Tr. p. 13) A part of that job included being able to evacuate the children from the bus if needed. (Hrg. Tr. pp. 13–14) It is more likely than not that Fleming's permanent functional limitations caused by the stipulated work injury would prevent him from returning to this job.

JMT hired Fleming as a dump truck driver. (Hrg. Tr. p. 14) He drove the truck, picked up materials, sometimes used a shovel, and cleaned out the truck. (Hrg. Tr. p. 14) Fleming estimated that he had to lift as much as fifty pounds in that job. (Hrg. Tr. p. 14) JMT discharged Fleming after he backed into another vehicle because it was company policy to terminate the employment of any employee whose negligence caused an accident. (Hrg. Tr. p. 15) Because of the functional limitations caused by the stipulated work injury, Fleming was unable to perform this job at the time of hearing.

After JMT, Fleming obtained employment driving a cement truck at CTI Concrete, where he worked for about two years. (Hrg. Tr. p. 15) The job duties were more physically demanding than driving a dump truck and he made more money. (Hrg. Tr. p. 15) For example, Fleming had to perform more lifting at CTI. (Hrg. Tr. p. 15)

While working for CTI, Fleming had a truck stolen and was struck by a vehicle while attempting to chase down the culprit. (Hrg. Tr. p. 26) The incident caused an injury to Fleming's knee that prevented him from being able to perform his job duties at CTI and while he was willing to work, CTI did not have work that he could perform given his limitations due to the injury. (Hrg. Tr. pp. 26–27) Fleming's boss advised him to file a claim with the Division of Unemployment Insurance Services at Iowa Workforce Development (IWD) for unemployment insurance (UI) benefits and Fleming did so. (Hrg. Tr. p. 26)

On the claim form, Fleming indicated he was able and available for work. (Hrg. Tr. p. 26) The agency initially awarded him UI benefits, but ultimately reversed its decision and concluded it had overpaid him benefits because he was not able and available for work. (Hrg. Tr. pp. 26–27) Fleming believes, and the record shows it is more likely than not, that he could perform some work at that time, just not all of the job duties he was performing before his injury. (Hrg. Tr. p. 27)

Nonetheless, IWD recommended Fleming for prosecution based on the allegation he made a misrepresentation on his claim for UI benefits and he ultimately entered a guilty plea. (Hrg. Tr. p. 27) At the time of hearing, he had paid about \$10,000.00 in restitution to IWD. (Hrg. Tr. p. 27) The undersigned concludes Fleming believed in good faith that he was eligible for UI benefits at the time he filed his claim because his boss advised him to apply and he was able to perform some work despite his injury, and he did not intend to receive benefits to which he was not entitled. The undersigned draws no negative inference with respect to Fleming's credibility from this incident.

Later in Fleming's tenure with CTI, he injured his back. (Hrg. Tr. p. 16) Because of the pain, Fleming took two pills of Vicodin he had from an old prescription on a Friday night after work to help alleviate his pain and then tested positive for Vicodin on the following Monday on a random drug test. (Hrg. Tr. pp. 16–17) CTI discharged Fleming because of the positive drug test. (Hrg. Tr. pp. 16–17) Fleming was physically incapable of performing the duties of a CTI cement truck driver at the time of hearing because of the functional limitations caused by the stipulated work injury.

GNA hired Fleming as a truck driver. (Hrg. Tr. p. 17) On December 9, 2019, a winter storm came through the Des Moines metro area. (Hrg. Tr. p. 17) Fleming's boss instructed him to return to the shop because the weather was too bad to drive. (Hrg. Tr. p. 17) Fleming's next memory is waking up at the hospital. (Hrg. Tr. p. 17)

Fleming was involved in a multiple-vehicle car crash on the interstate near Mitchellville, Iowa. (Ex. JE-2, p. 24) Fleming was transported to the Mercy Hospital and when he woke up there, he could not move anything. (Hrg. Tr. p. 18; Ex. JE-2, p. 24) Fleming was diagnosed with a spinal cord injury at C5-6, a traumatic disk injury at C7-T1, and facial lacerations. (Ex. JE-2, pp. 23–29). Because of Fleming's severe spinal cord injury, he underwent emergency surgery on his back consisting of anterior cervical discectomy and arthrodesis at C5-C6 and C7-T1, placement of intervertebral biomechanical devices at C5-C6 and C7-T1, anterior cervical plating between C5 and

T1, and use of morselized allograft. (Ex. JE-2, pp. 23–26). Fleming also underwent surgery to repair his facial lacerations. (Ex. JE-2, pp. 27–29)

Ultimately, providers transferred Fleming to a rehabilitation hospital by ambulance. (Hrg. Tr. p. 18) While at the facility, he participated in physical therapy and occupational therapy for several hours daily. (Hrg. Tr. p. 18–19) Fleming found the intensive therapy regimen there very helpful. (Hrg. Tr. p. 19)

The defendants arranged for Fleming to undergo an independent medical examination (IME) with Robert Broghammer, M.D., on May 17, 2021. (Ex. JE-3, p. 36) Dr. Broghammer performed a records review and examination of Fleming, then issued an IME report dated May 21, 2021. (Ex. JE-3, pp. 36–43) Dr. Broghammer opined on multiple questions probative in reaching a determination of the issues disputed between the parties. (Ex. JE-3, pp. 43–47)

On the question of maximum medical improvement (MMI), Dr. Broghammer opined that Fleming reached MMI on December 17, 2020, because that “is the point in time when the worker followed up with [Ai Huong Phu, D.O.] with a recent MRI showing essentially normal findings without any evidence of hydronephrosis or nephrology disease” and it was “the point in time that the worker’s back pain had gotten substantially better, and he was sleeping throughout the night without waking up as often.” (Ex. JE-3, p. 44) Fleming credibly testified that he had plateaued in terms of his recovery about a year out from his December 9, 2019 surgery. (Hrg. Tr. pp. 35–36) The weight of the evidence establishes that Fleming reached MMI on December 17, 2020.

Dr. Broghammer opined that Fleming sustained a permanent partial impairment (PPI) from the stipulated work injury and used the Fifth Edition of the American Medical Association’s *Guides to the Evaluation of Permanent Impairment (Guides)*<sup>1</sup> to opine as to its extent. (Ex. JE-3, p. 44) He used Table 13-15, “Criteria for Rating Impairments due to Station and Gait Disorders,” to place Fleming into Class 3 because Fleming can rise and maintain standing position with difficulty but cannot walk without assistance. (Ex. JE-3, p. 44; *Guides*, p. 336) According to the table, the range of PPI for an individual in Class 3 is 20 to 39 percent and Dr. Broghammer assigned Fleming a 30 percent impairment of the whole person under the table. (Ex. JE-3, p. 44; *Guides*, p. 336)

Dr. Broghammer then consulted Table 13-17, “Criteria for Rating Impairments of Two Upper Extremities,” to place Fleming in Class 2, for individuals that can use both upper extremities for self-care and can grasp and hold objects with difficulty but has no digital dexterity. (Ex. JE-3, p. 44; *Guides*, p. 340) Under the table, Class 2 has a PPI

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<sup>1</sup> In 2017, the legislature amended the Iowa Workers’ Compensation Act to require, under Iowa Code section 85.34(2)(x), “In all cases of permanent partial disability described in paragraphs “a” through “u”, or paragraph “v” when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the [*Guides*], published by the American medical association, as adopted by the workers’ compensation commissioner by rule pursuant to chapter 17A.” Iowa Administrative Code rule 876—2.4 adopts the Fifth Edition of the *Guides* for use in workers’ compensation cases. In this decision, all references to the *Guides* are to the Fifth Edition unless otherwise noted.

range between 20 and 39 percent to the whole person. (Ex. JE-3, p. 44; *Guides*, p. 340) Because Fleming demonstrated difficulty in range of motion of the left shoulder on examination, Dr. Broghammer assigned him a 39 percent impairment to the whole body. (Ex. JE-3, p. 44)

Section 13.7 of the *Guides*, "Criteria for Rating Spinal Cord and Related Impairments," addresses the respiratory, anorectal, urinary, and sexual systems. (Ex. JE-3, p. 45; *Guides*, pp. 340–42) Dr. Broghammer noted Fleming had no issue with his bladder and no troubles with respiration, so he opined Fleming had no PPI under the table. (Ex. JE-3, p. 45) Using Table 13-20, "Criteria for Rating Neurologic Anorectal Impairment," Dr. Broghammer placed Fleming in Class 1 and assigned him a 10 percent whole person impairment because he had "some reflex regulation but only limited voluntary control." (Ex. JE-3, p. 45) Using Table 13-21, "Criteria for Rating Neurologic Sexual Impairment," Dr. Broghammer placed Fleming in Class 3 and assigned a 20 percent PPI to the whole person because has no sexual function. (Ex. JE-3, p. 45)

Dr. Broghammer then used the Combined Values Chart on pages 604 and 605 of the *Guides* to combine the values of the multiple PPI ratings:

39% upper extremity impairment related to neurologic disorders combined with 30% for lower extremity impairment related to his neurologic disorders would equate to a 57% whole person impairment. A 57% whole person impairment combined with 20% impairment for sexual functioning yields a 66% whole person impairment. A 66% whole person impairment combined with 10% whole person impairment for the worker's anorectal impairment yields a 69% whole person impairment.

(Ex. JE-3, p. 45)

Dr. Broghammer opined on permanent work restrictions thusly:

Mr. Fleming would have extensive work restrictions. Given his age and education, I am not sure what gainful employment Mr. Fleming could complete. He cannot use his hands for writing or typing or any fine motor control. He can only use them on in gross manner. He is limited in his left upper extremity use, and so he could not do any at or above shoulder level work. He has weakness in all four extremities due to his cervical cord injury, and I do not think he could reasonably lift more than 10 pounds in a work setting. He certainly cannot stand or walk to any degree for work because he requires assistance from an individual as well as the use of a cane. He would be confined to his motorized wheelchair. He cannot write. He cannot balance. He cannot stoop, squat, crawl, crouch, or kneel. He cannot climb ladders. He cannot climb stairs. He cannot do any pushing or pulling to any significant degree.

In my medical opinion, if Mr. Fleming were trained as a psychiatrist or an attorney or had some type of training such as a motivational speaker, he

may be able to return to some type of speaking work. In my medical opinion, this is likely the only gainful employment activity that Mr. Fleming could do, and that would be talking. He is so physically debilitated from this injury that I do not think there is anything physical that he could reasonably do from a gainful employment perspective, and I highly doubt he would be able to find work in a competitive workforce. Again, if Mr. Fleming could work in a capacity with speaking, he might be able to do this, but this is the only gainful employment activity that I think he could reasonably complete given his significant injuries. As noted previously, unfortunately, he does not have formal training in psychology, psychiatry, law or any other field that would require . . . the use of his mind, and I highly doubt he would find anything in the competitive workforce.

(Ex. JE-3, pp. 46–47)

With respect to future care, Dr. Broghammer recommended Fleming continue care with Dr. Phu “for ongoing pain management to include but not necessarily limited to his baclofen as well as his chemodenervation with Botox up to four times yearly.” (Ex. JE-3, p. 46) He also recommended supplies and equipment for anorectal dysfunction, bracing devices as needed, and additional home equipment such as a bed with an adjustable mattress or mechanical lift to help with transfers. (Ex. JE-3, p. 46) Dr. Broghammer made clear that these are foreseeable needs and other needs may arise. (Ex. JE-3, p. 46)

Claimant’s counsel arranged for Fleming to undergo an IME with Sunil Bansal, M.D., an occupational medicine specialist, on August 5, 2022, in Urbandale, Iowa. (Ex. JE-1, p. 1) Dr. Bansal performed a records review and in-person examination, then issued a report dated October 27, 2022, in which he answered multiple questions posed by claimant’s counsel. (Ex. JE-1) Dr. Bansal agreed with the diagnoses Fleming received from his care providers and Dr. Broghammer. (Ex. JE-1, pp. 18–19)

On the question of PPI to Fleming’s face, Dr. Bansal opined, “With reference to [the *Guides*], Fifth Edition, specifically Table 8.2, Mr. Fleming meets the criteria of a Class 1 impairment. For his facial scarring he is assigned a 5% whole person impairment.” (Ex. JE-1, p. 20; *Guides*, p. 178)

Dr. Bansal addressed PPI in activities of daily living (excluding work) to the rest of Fleming’s body as follows:

Mr. Fleming has corticospinal tract impairment from his cervical spine condition related to his December 9, 2019 injury. Guidance for this condition is provided per the [*Guides*], Fifth Edition, Section 15.7.

For Mr. Fleming, six rating categories are combined for the total impairment.

First is the DRE Category per Table 15-5. With reference to the [*Guides*], Fifth Edition, specifically Table 15-5, we find that Mr. Fleming meets criteria from DRE Category IV. He is status post anterior cervical discectomy and arthrodesis at C5-C6 and C7-T1, placement of intervertebral biomechanical devices at C5-C6 and C7-T1, anterior cervical plating between C5 and T1, and use of morselized allograft. He has been left with spastic quadriplegia and limited use of his upper and lower extremities. He is assigned a **28% whole person impairment**[.]

(Ex. JE-1, pp. 20–21)

The legislature has mandated use of the *Guides* when determining the extent of loss or percentage of permanent impairment. This makes the *Guides* dispositive on the question of permanent impairment when determining the extent of disability and entitlement to benefits for such. In Section 15.6, “DRE: Cervical Spine,” the *Guides* explain how to use Table 15-5 when evaluating permanent impairment, stating, “If the cervical spine problem is due to corticospinal tract involvement, use Table 15-6 alone.” *Guides*, p. 392.

Dr. Bansal states, “Fleming has corticospinal tract impairment from his cervical spine condition related to his December 9, 2019 injury.” (Ex. JE-1, p. 20) He then uses Table 15-5, “Criteria for Rating Impairment Due to Cervical Disorders,” in addition to Table 15-6. This is contrary to the directive in the *Guides* to “use Table 15-6 alone” if the individual’s “cervical spine problem is due to corticospinal tract involvement.” *Guides*, p. 392. Therefore, the portion of Dr. Bansal’s permanent impairment rating using Table 15-5 is rejected because it does not adhere to the *Guides*.

Dr. Bansal assigned Fleming the following PPI ratings using Table 15-6:

For his upper extremity dysfunction, per Table 15-6b he meets the criteria of a Class 3 impairment as he has no functional use of his upper extremities and is assigned a 79% whole person impairment.

For his station and gait disorder, per Table 15-6c we find that he meets the criteria for Class 3 impairment, as he utilizes a wheelchair and cane for ambulation. Therefore, I assign a 39% whole person impairment rating.

For his neurological bladder, per 15[-]6d he meets the criteria for a Class 1 impairment, as he has intermittent incontinence and does require periodic catheterization. He is assigned a 9% whole person impairment.

For his neurogenic bowel, per 15[-]6e he meets the criteria for a Class 1 impairment, but he does require frequent enemas. He is assigned a 19% whole person impairment.

For his sexual impairment, per 15[-]6f he is assigned a 20% impairment of the body as a whole for having no sexual function.



(Ex. JE-1, p. 21)

Dr. Bansal offered the following assessment in response to questions about what activities Fleming should avoid and whether he has the ability to work:

Mr. Fleming has no practical function of his hands, and markedly restricted ambulation. In this case, rather than enumerating a list of activities that Mr. Fleming should avoid, the list of activities that he is able to perform is far shorter, and in this case no practical function is noted.

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Mr. Fleming does not have the ability to be gainfully employed. He lacks functionality of his hands, and has markedly limited ambulatory ability. He has frequent bowel incontinence. It would not be practical or feasible for Mr. Fleming to be employed.

(Ex. JE-1, pp. 21–22)

At the time of hearing, Fleming was receiving ongoing care. Dr. Phu manages Fleming's prescription medications and administers Botox injections, which help loosen up Fleming's muscles. (Hrg. Tr. pp. 20–21) Dan Moyse, M.D., a pain management specialist, administers trigger point injections in his lower back to stimulate the muscles and reduce his pain. (Hrg. Tr. p. 22; Ex. JE-3, pp. 49–57)

Before the stipulated work injury, Fleming's wife, Rhonda, was working as a dispatcher for a towing company in Des Moines. (Hrg. Tr. p. 19) The crash and resulting disability caused her to quit her job and become his primary caretaker. (Hrg. Tr. p. 19) She helps Fleming get in and out of his wheelchair, bathe, get dressed, complete personal care activities, use the restroom, with his medication, and to prepare his meals. (Hrg. Tr. pp. 19–20, 30–31) They also periodically have a caretaker help Rhonda out with Fleming's needs. (Hrg. Tr. pp. 25–26) The Flemings' grandchildren assist him as well. (Hrg. Tr. pp. 29–30)

In the week before hearing, Fleming was hospitalized because doctors thought he was having a stroke. (Hrg. Tr. p. 22) However, it turned out he was just experiencing a bad migraine, was dehydrated, and his blood pressure was low. (Hrg. Tr. pp. 22–23) Migraines are a common and random occurrence in Fleming's life after the crash. (Hrg. Tr. p. 23)

Before the crash, Fleming had no issues with body temperature regulation. (Hrg. Tr. p. 24) Since the crash, Fleming feels cold all of the time. (Hrg. Tr. p. 24) He needs a blanket even when the temperature is in the 90s. (Hrg. Tr. p. 24) Fleming's muscles tighten when they get cold. (Hrg. Tr. p. 24) His hands are regularly tight; however, when cold, his hands tighten into an extremely tight fist. (Hrg. Tr. p. 25)

At the time of hearing, Fleming had a valid driver's license. (Hrg. Tr. p. 33) He attended school to learn how to drive with hand controls and his vehicle is equipped with them. (Hrg. Tr. p. 33) No doctor has told Fleming that he is physically incapable for driving. (Hrg. Tr. p. 33)

Fleming primarily uses an electric wheelchair for mobility. (Hrg. Tr. p. 35) He uses it when he leaves his residence. (Hrg. Tr. p. 35) Around the house, Fleming walks with a cane and his wife's assistance. (Hrg. Tr. p. 35)

At the time of hearing, Fleming would have good days and bad days with respect to his physical capabilities. (Hrg. Tr. p. 29) Some days, he spends the majority of his waking time in bed. (Hrg. Tr. p. 29) This worsens his depression. (Hrg. Tr. p. 29)

Fleming did not look for work between the date of the stipulated work injury and the 2022 Iowa State Fair. (Hrg. Tr. pp. 33–34) Fleming saw a job listing online for the State Fair, applied, and got the job. (Hrg. Tr. p. 34–35) During the State Fair, Fleming could not use the scanner to scan tickets because he was physically incapable of pulling the trigger to activate the scanner, so they assigned him to work at the gate stamping fairgoers hands if they wanted re-entry. (Hrg. Tr. p. 34, 36–37) The State Fair effectively accommodated Fleming by eliminating the requirement that he scan tickets and allowing him to only stamp fairgoers as they exited.

Fleming credibly testified that he never intended to go without a job and that he would love to work despite his disability. (Hrg. Tr. p. 28) Fleming also credibly testified that, before the stipulated work injury, he intended to work until he was 70 or could no longer work. (Hrg. Tr. p. 28) If he would have been capable of working past the age of 70, he would have. (Hrg. Tr. pp. 28–29)

In the determination of the extent of permanent impairment, the disfigurement of Fleming's face must be considered. Section 8.2 of the *Guides*, entitled "Disfigurement," defines "skin disfigurement" for its purposes to mean,

an altered or abnormal appearance that may be an alteration of color, shape, or structure, or a combination of these. Disfigurement may be a residual of injury or disease, or it may accompany a recurrent or ongoing disorder. Examples of disfigurement include giant pigmented nevi, nevus flammeus, cavernous hemangioma, and pigmentation alteration.

Disfigurement usually has no effect on body function and may have little or no effect on the ability to perform activities of daily living, except if the disfigurement causes social rejection or an unfavorable self-image with self-imposed isolation, lifestyle alteration, or other behavioral changes.

*Guides*, pp. 175–76.

The *Guides* direct an evaluator of permanent impairment to use Table 8-2, "Criteria for Rating Permanent Impairment Due to Skin Disorders," when rating the

impairment caused by disfigurement. Id. at pp. 176, 178. When using Table 8-2, the *Guides* instruct:

The signs and symptoms of disorders in classes 1, 2, and 3 may be intermittent and not present at the time of examination. Consider the impact of the skin disorder on the ability to perform activities of daily living (see Table 1-2) in determining the class of impairment. Consider the frequency and intensity of signs and symptoms (i.e., severity) and the frequency and complexity of medical treatment when selecting an appropriate impairment percentage and estimate within any class (see Introduction).

Id. at 178 (Table 8-2 Asterisk).

Class 1 on the table is used when the following criteria are met:

Skin disorder signs and symptoms present or intermittently present

***and***

no or few limitations in performance of activities of daily living; exposure to certain chemical or physical agents may temporarily increase limitation

***and***

requires no or intermittent treatment

Id. at p. 178 (bold-face and italics used in original).

Dr. Broghammer did not assign Fleming an impairment rating for the disfigurement of his face caused by the vehicle crash. Neither did any of Fleming's treating physicians. However, none of these doctors opined Fleming did not sustain a permanent impairment under Table 8-2. The undersigned finds Dr. Bansal's opinion on permanent impairment for the facial disfigurement persuasive because Fleming meets the criteria set forth in the *Guides*, Table 8-2, for Class 1. It is more likely than not Fleming sustained a permanent impairment of 5 percent to the whole body due to the facial disfigurement caused by the stipulated work injury.

Moving to Fleming's spinal cord injury, when comparing Dr. Bansal's opinion on PPI to that of Dr. Broghammer, the notable difference is the former uses Table 15-6 and the latter uses tables in Chapter 13. The cause for their different references is discussed in the *Guides*:

In prior editions of the *Guides*, rating spinal cord injury was done either through a combination of DRE categories or in the nervous system chapter. It was decided in this edition to evaluate spinal cord injuries based on the criteria in the nervous system chapter (Chapter 13). These criteria are repeated in this section. For bilateral neurologic or

corticospinal tract damage, consultation with a spinal cord injury specialist and review of Chapter 13, The Central and Peripheral Nervous System, is recommended. Thus, for an individual with a spinal cord injury affecting the upper extremities, use Table 15-6 and the appropriate impairment rating for impairment of one or both upper extremities. For impairments involving the loss of use of the lower extremities, use the section in Table 15-6 pertaining to station and gait impairment. If there is additional bowel or bladder dysfunction, combine the upper extremity or lower extremity loss with impairments in bladder, anorectal, and/or neurologic sexual impairment as warranted.

Once a class has been selected, the exact value is obtained by combining the value with the corresponding additional impairment from DRE categories II through V for cervical lumbar impairment and DRE categories II through IV for thoracic impairment. An exact value is determined based on degree of impairment of [activities of daily living].

*Guides*, p. 396. Example 15-17 provides an illustrative example of a man who sustained a vertebral fracture with corticospinal tract involvement, which means “he should be rated using the neurology tables.” *Id.* at 397.

Thus, Dr. Bansal did not use the neurology tables, as the *Guides* instruct, and Dr. Broghammer did. Nonetheless, their ratings largely used the same standards because the *Guides* published them in both Chapter 13 and Chapter 15. Thus, the two experts used the same guidelines in their opinions, even if they are found in different chapters and tables of the *Guides*.

The duo’s opinions diverge most widely on the question of permanent impairment to the upper extremities. While both doctors placed Fleming in Class 3, “Individual can use both upper extremities but has difficulty with self-care,” Dr. Bansal concluded Fleming had “no functional use of his upper extremities,” which seems more in line with Class 4, “Individual cannot use upper extremities,” and assigned him a 79 percent impairment rate. In contrast, Dr. Broghammer placed Fleming in Class 2, “Individual can use both upper extremities for self-care, can grasp and hold objects with difficulty, but has no digital dexterity,” and assigned him 39 percent permanent impairment, the highest allowed in this category.

The evidence shows that Fleming is properly categorized in Class 3, as Dr. Bansal opined, because while “he can use both upper extremities,” he nonetheless “has difficulty with self-care activities.” Fleming’s difficulty is such that he requires assistance from family members, and occasionally a professional, with self-care activities. Therefore, Dr. Bansal’s 79 percent impairment rating is adopted because it is supported by the weight of the evidence in the record.

With respect to Fleming’s station and gait disorder, Dr. Bansal placed him in Class 3, “Rises and maintains standing position with difficulty; cannot walk without assistance,” and assigned him a 39 percent whole person impairment rating, the highest

allowed in that class under the tables. Dr. Broghammer similarly placed Fleming in Class 3, but opined his impairment rating was 30 percent. The evidence here shows that while Fleming can stand, he rarely walks, even with assistance, outside the home. His primary means of getting around is using his electronic wheelchair. Consequently, Dr. Bansal's opinion is more persuasive and is adopted. It is more likely than not Fleming sustained a 39 percent whole person impairment for the station and gait disorder caused by the stipulated work injury.

On the neurologic impairment of Fleming's bladder, Dr. Bansal opined Fleming had a 9 percent impairment because of "intermittent incontinence" and "periodic catheterization" occurring approximately once every six months. In contrast, Dr. Broghammer assigned an impairment rating of zero percent because he had no issue with his bladder or respiration. Requiring periodic catheterization, even once every six months on average, shows Dr. Broghammer's assessment that he has no issue with his bladder is incorrect. Fleming has "intermittent incontinence," which means Dr. Bansal properly categorized him in Class 1. Dr. Bansal's 9 percent impairment rating is adopted.

Both experts classified Fleming's neurologic anorectal impairment as falling under Class 1, for individuals with "reflex regulation but only limited voluntary control." Dr. Bansal assigned a 19 percent whole person impairment because Fleming requires frequent enemas. Dr. Broghammer opined Fleming had a 10 percent impairment without explanation. Dr. Bansal's reasoning based on Fleming requiring enemas is more persuasive. Dr. Bansal's impairment rating is adopted.

On the question of neurologic sexual impairment, the experts agreed. Both assigned Fleming a 20 percent whole body impairment because he has no sexual function. Their consensus impairment rating is adopted.

The *Guides* include the Combined Values Chart on pages 604 and 605 for combining different impairment ratings into one. Doing so here, we start with 79 percent impairment to the upper extremities and combine it with 39 percent for station and gait, which combine for 87 percent on the Chart. 87 percent combines with Fleming's 20 percent neurologic sexual impairment for 90 percent. That combines with 19 percent for his neurologic anorectal impairment to equal 92 percent, which combines with the 9 percent impairment to his bladder for 93 percent. And 93 percent combines with the 5 percent impairment for his facial disfigurement for 93 percent. Thus, the stipulated work injury has caused Fleming to sustain a 93 percent permanent impairment in activities of daily living excluding work under the *Guides*.

Further, Dr. Broghammer and Dr. Bansal also articulated similar opinions with respect to permanent work restrictions. Dr. Broghammer opined that Fleming might be able to return to work if he had education, training, and experience as an attorney, therapist, or speaker; however, because he does not, "[h]e is so physically debilitated from this injury that I do not think there is anything physical that he could reasonably do from a gainful employment perspective, and I highly doubt he would be able to find work in a competitive workforce." Dr. Bansal opined that "[i]t would not be practical or feasible

for Mr. Fleming to be employed.” The undersigned finds the opinions of both doctors persuasive with respect to Fleming’s ability to work given the physical limitations caused by the stipulated work injury and adopts them.

## **V. CONCLUSIONS OF LAW.**

In 2017, the Iowa legislature amended the Iowa Workers’ Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments took effect on July 1, 2017. See id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers’ Compensation Act, as amended in 2017, applies. See Stiles v. Annett Holdings, Inc., No. 5064673, 2020 WL 6037539 \*2 (Iowa Work. Comp. Comm’r, App., Oct. 2, 2020).

### **A. Permanent Disability.**

Iowa Code section 85.34(3) is entitled, “Permanent total disability,” but does not define the term or contain a framework for determining whether an injured employee is permanently and totally disabled due to a work injury. The Iowa Supreme Court has held the factors used to evaluate industrial disability under what is now section 85.34(2)(v) are also used to determine whether a work injury has caused permanent total disability under section 85.34(3). See Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 495 (Iowa 2003) (quoting Guyton v. Irving Jensen Co., 373 N.W.2d 101, 103 (Iowa 1985)). The extent of an injured employee’s industrial disability is based on consideration of the following factors: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before and after the injury, motivation to work, personal characteristics, and the employer’s inability to accommodate the injured employee’s functional limitations. See Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 526 (Iowa 2012); IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632–33 (Iowa 2000); E.N.T. Assoc. v. Collentine, 525 N.W.2d 827, 830 (Iowa 1994); Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

The Iowa Supreme Court has quoted the Commissioner with approval for the principle that under the Iowa Workers’ Compensation Act, “[t]otal disability does not mean a state of absolute helplessness.” Caselman, 657 N.W.2d at 501 (quoting Al-Gharib, 604 N.W.2d at 633). “Such disability occurs when the injury wholly disables the employee from performing work that the employee’s experience, training, intelligence, and physical capacities would otherwise permit the employee to perform.” Al-Gharib, 604 N.W.2d at 633 (citing Diederich v. Tri-City Ry., 219 Iowa 587, 593–94, 258 N.W. 899, 902 (1935)). A finding that claimant could perform some work despite claimant’s physical and educational limitations does not foreclose a finding of permanent total disability. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982). “Simply put, the question is this: Are there jobs in the community that the employee can do for which the employee can realistically compete?” Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 815 (Iowa 1994) (citing Guyton v. Irving Jensen Co., 373 N.W.2d 101, 103, 104 (Iowa 1985)).

Permanent impairment is one factor considered when determining permanent disability. As found above, the stipulated work injury caused Fleming to sustain a 93 permanent impairment to the whole body. This is a significant permanent impairment.

Fleming was 63 years of age at the time of hearing. He had achieved a high school diploma and certificate as a mechanic. Given his age, educational background, and physical limitations, he is a poor candidate for retraining and education.

Another factor that must be considered is the injured employee's work history. Fleming has been motivated to work throughout his adult life. He has consistently sought out employment, typically with demanding job duties. Fleming's training and experience are in jobs that require physical labor. The physical limitations caused by the stipulated work injury prevent him from returning to these types of jobs.

Fleming is no longer able to perform the job he held at GNA at the time of injury. He could not perform the ancillary duties relating to driving a cement truck such as shoveling and cleaning the truck. Further, while Fleming has learned to drive a car using only his hands with special attachments, the weight of the evidence in this case shows he could not physically drive a cement truck for GNA, which is a more physically demanding endeavor.

Evidence of Fleming's motivation to work is found in him applying and getting hired to work at the gate of the Iowa State Fair. Fleming's disability, caused by the stipulated work injury, prevented him from being able to use the ticket scanner because he lacks the dexterity in his hands to do so. This demonstrates the extent of Fleming's physical limitations, which the State Fair accommodated by eliminating a primary job duty of his position—scanning tickets—and allowing him to only stamp fairgoers' hands as they left.

Further, when asked about whether Fleming could return to work, both expert witnesses opined that they did not see how he could return to the competitive labor market because of the physical limitations caused by the stipulated work injury. Dr. Broghammer opined that he does not think there is anything physical that Fleming could reasonably do from a gainful employment perspective. Dr. Bansal stated it is not feasible for Fleming to be employed. The record shows there is little reason to believe Fleming can find job on the open labor market, regardless of how hard he looked.

Fleming has no income from work. He receives disability benefits. The stipulated work injury and resulting disability have had a significant negative impact on his earnings.

Fleming has met his burden of proof. The weight of the evidence shows there are no jobs in the community that he can do for which he can realistically compete. The stipulated work injury has left Fleming permanently and totally disabled under Iowa Code section 85.34(3).

**B. Commencement Date.**

Iowa Code section 85.34 provides, “Compensation for permanent disabilities and during a healing period for permanent partial disabilities shall be payable to an employee as provided in this section.” Under section 85.34(1), an injured employee is entitled to healing period benefits “beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or it is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.” And section 85.34(2) states, “Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of the Guides . . . .”

Thus, the statute uses the term “maximum medical improvement” and ties it to the ability to evaluate permanent impairment using the Guides. *Id.* The Guides use the term “maximal medical improvement.” Guides, p. 19. While the terminology between the two is different, the substantive meaning of the two terms, as fleshed out in the Guides and Iowa Supreme Court precedent pre-dating the 2017 amendments, is largely similar.

The Guides provide, “An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.” *See id.* “Maximal medical improvement refers to the date from which further recovery or deterioration is not anticipated, although over time there may be some expected changes. Once an impairment has reached [maximal medical improvement], a permanent impairment rating may be performed.” *Id.*

The Iowa Supreme Court has held “a claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved.” Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, (Iowa 2010) (citing 4 Arthur Larson & Lex K. Larson, *Larson’s Workers’ Compensation Law* § 80.03D[3] n. 10, at D80–43 to D80–48.2 (2009)). “[A] claimant is entitled to PPD benefits upon proof that ‘it is medically indicated that *significant* improvement from the injury is not anticipated.’” Broadlawns Med. Ctr. v. Sanders, 792 N.W.2d 302, 307 (Iowa 2010) (quoting Iowa Code § 85.34(1)) (emphasis in opinion). “Any disability that remains after stabilization of the condition will support an award of [PPD] benefits to the extent the residual impairment decreases the claimant’s earning capacity.” *Id.*

As found above, Dr. Broghammer’s opinion on the date of MMI is most persuasive. It is supported by Fleming’s testimony with respect to when his recovery plateaued. The weight of the evidence establishes that Fleming reached MMI on December 17, 2020. This is the proper commencement date for permanent disability benefits.



**C. Rate.**

The parties stipulated Fleming's gross earnings on the stipulated injury date were gross earnings were \$926.54 per week. They also stipulated he was married and entitled to five exemptions at the time. Based on the parties' stipulations and the rate spreadsheet issued by the agency for work injuries sustained between July 1, 2019 and June 30, 2020, Fleming's workers' compensation rate is \$630.15 per week.

**D. IME Reimbursement.**

The parties identified IME reimbursement as a disputed issue in the hearing report. (Hrg. Rpt. § 8) They agreed that this was a disputed issue at the time of hearing. (Hrg. Tr. p. 5) In Fleming's post-hearing brief, he argues he is entitled to \$577.00 for the cost of Dr. Bansal's examination under section 85.39(2) and \$3,912.00 for the cost of his report under section 86.40 and Iowa Administrative Code rule 876—4.33(6).

In the 2017 amendments, the legislature mandated use of the *Guides* for the determination of functional impairment. As their title would suggest, the *Guides* contain clear instructions for the steps a physician should take when evaluating permanent impairment. *Guides*, chs. 1–2. The evaluation process is inextricably intertwined with the impairment rating because the former is the end result of the latter. *See id.* The legislature would not codify a requirement to use only the *Guides* when determining permanent impairment in Iowa Code section 85.34(2)(v) if section 85.39(2) does not allow for reimbursement relating to an examination that complies with that which the *Guides* expressly direct a physician to include as part of the evaluation of permanent impairment, including the evaluation and report. *See Guides*, pp. 17–24.

Dr. Bansal's report reflects that he performed the examination of Fleming in accordance with the *Guides*, which means Fleming is entitled to reimbursement for the cost of the examination. The undersigned finds that Fleming is entitled to reimbursement for the full cost of Dr. Bansal's examination and report under Iowa Code section 85.34(2) because they comply with Chapter 2 of the *Guides*. The defendants shall pay to Fleming \$4,489.00, the reasonable cost of Dr. Bansal's examination.

**E. Costs.**

"All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commission." Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. *Id.* (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Because Fleming prevailed on the disputed issue of the extent of permanent disability caused by the work injury, the following costs are taxed against the defendants under Iowa Code section 86.40 and Iowa Administrative Code rule 876—4.33:

- \$14.66 for the original notice cost of service; and
- \$103.00 for the cost of the filing fee and convenience fee incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES).

## **VI. ORDER.**

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

- 1) The defendants shall pay to Fleming permanent total disability benefits at the rate of six hundred thirty and 15/100 dollars (\$630.15) per week from the commencement date of December 17, 2020.
- 2) The defendants shall pay accrued weekly benefits in a lump sum.
- 3) The defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.
- 4) The defendants are to be given the credit for benefits previously paid for the stipulated amount.
- 5) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).
- 6) The defendants shall pay Fleming four thousand four hundred eighty-nine and 00/100 dollars (\$4,489.00) for Dr. Bansal's examination under Iowa Code section 85.39.
- 7) The defendants shall pay to Fleming the following amounts for the following costs:
  - a. One hundred three and 00/100 dollars (\$103.00) for the filing fee;
  - b. Fourteen and 66/100 dollars (\$14.66) for the original notice cost of service;
- 8) The parties shall be responsible for paying their own hearing costs. Each party shall pay an equal share of the cost of the transcript.

Signed and filed this 4th day of August, 2023.

A handwritten signature in black ink, appearing to read "Ben Humphrey", is written over a horizontal line.

BEN HUMPHREY  
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

John Lawyer (via WCES)

Timothy W. Wegman (via WCES)

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 10A) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.