BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRY PARSONS, Claimant, vs. HY-VEE ALGONA, Employer, and EMC INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 5066686 ARBITRATION DECISION Head Note Nos.: 1108.50, 1405.40, 1803, 1803.1, 2601.10

STATEMENT OF THE CASE

Terry Parsons filed a petition in arbitration seeking workers' compensation benefits from the defendants, employer Hy-Vee, Inc. (Hy-Vee) and insurance carrier EMC Insurance Companies (EMC), for an alleged injury to the right lower extremity and whole body. The undersigned presided over a hearing in this case on April 21, 2020, via online video stream. Janece Valentine represented Parsons and Dennis Riekenberg represented the defendants.

ISSUES

Under rule 876 IAC 4.149(3)(*f*), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the agency for determination. The undersigned issued an order approving the hearing report and entering it into the record 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, if any, resulting from the stipulated work injury?

2) Is Parsons entitled to recover the cost of an independent medical examination (IME) under Iowa Code section 85.39?

3) Are costs taxed against the defendants under Iowa Code section 86.40?

STIPULATIONS

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

1) An employer-employee relationship existed between Parsons and Hy-Vee at the time in question.

2) Parsons sustained an injury on October 21, 2015, which arose out of and in the course of his employment with Hy-Vee.

3) The commencement date for permanent partial disability benefits, if any are awarded, is April 3, 2019.

4) At the time of the stipulated injury:

    a. Parsons's gross earnings were $318.25 per week.

    b. Parsons was married.

    c. Parsons was entitled to two exemptions.

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

FINDINGS OF FACTS

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 15;
- Defendants' Exhibit (Def. Ex.) A; and
- Hearing testimony by Parsons and Noah Utterback, a night stock manager at the Hy-Vee store where Parsons worked.

After careful consideration of the evidence, the undersigned makes the following findings of fact.

Parsons, a life-long Iowan, resides in Burt. (Hrg. Tr. p. 15) He did not complete high school because he dropped out in the eleventh grade after his father died. (Hrg. Tr. p. 15) At the time of hearing, Parsons had not obtained his GED or any postsecondary degrees or certificates. (Hrg. Tr. p. 16)

Parsons worked at Pizza Hut and then washed dishes at Nick's Pizza & Steakhouse. (Hrg. Tr. p. 16) After Parsons turned 18, he worked on a farm performing field work and helping with livestock. (Hrg. Tr. p. 17) He next worked at a hatchery transferring eggs. (Hrg. Tr. p. 17)

While working at the hatchery in 1987, Parsons was diagnosed with cone dystrophy, which rendered him legally blind. (Hrg. Tr. p. 18) He gave up his driver's license because of the diagnosis. (Hrg. Tr. p. 18) Parsons applied for Social Security Disability benefits and the federal Social Security Administration (SSA) found him

eligible. (Hrg. Tr. p. 58) Because of Parsons's disability, he is unable to effectively use a computer due to his limited ability to see the keyboard. (Hrg. Tr. p. 62)

Parsons continued to work despite receiving Social Security benefits. He kept track of his earnings to make sure he did not earn more than is allowed for a recipient of Social Security benefits under federal law. (Hrg. Tr. p. 58) Parsons worked for about a year and a half taking engines apart at a junkyard. (Hrg. Tr. p. 55) But for the vast majority of the time between his Social Security benefits eligibility determination and beginning employment with Hy-Vee, Parsons worked as a part-time farmhand on a friend's farm doing fieldwork and helping repair machinery. (Hrg. Tr. p. 55) During his time working at the farm, he picked up some mechanical skills in maintaining equipment. (Hrg. Tr. p. 56)

Hy-Vee hired Parsons on March 8, 2015, to stock shelves at its Algona grocery store. (Jt. Ex. 3, p. 15; Hrg. Tr. p. 20) His duties included bringing produce on pallets from the back of the store to the aisles for shelving. (Hrg. Tr. p. 20) Parsons used a pallet jack to help move products for shelving. (Hrg. Tr. p. 21) Utterback testified Parsons "did a good job" and was an employee he "didn't really have to worry about a whole lot." (Hrg. Tr. p. 69)

On October 21, 2015, Parsons was working at Hy-Vee. (Jt. Ex. 1; Hrg. Tr. pp. 20–22) Parson was pulling a hand pallet jack with canned goods on it. (Hrg. Tr. p. 22) He slipped and the two back wheels of pallet jack ran over his right foot. (Jt. Exs. 1, 4, p. 16; Hrg. Tr. p. 22) Parsons fell backward, causing a hyperextension injury to the right foot and ankle as well as the crush injury. (Jt. Ex. 4, p. 16)

Parsons went to the emergency room at Kossuth Regional Health Center. (Hrg. Tr. p. 25) Mark Davis, PA-C, provided care that night and during the early morning hours of October 22. (Jt. Ex. 14, p. 16) Davis ordered X-rays of Parsons's injured foot. (Jt. Ex. 4, p. 16)

Davis observed Parsons's foot showed minimal swelling. (Jt. Ex. 4, p. 16) Parsons complained of significant pain in his right foot and anterior ankle. (Jt. Ex. 4, p. 16) The pain ran from the extensor surface of his great toe, directly up his forefoot, and to the anterior ankle. (Jt. Ex. 4, p. 16) Parsons did not complain of numbness or tingling. (Jt. Ex. 4, p. 16) X-rays did not show any acute fractures. (Jt. Ex. 4, p. 16)

Davis advised Parsons to stay off his foot as much as possible over the coming days. (Jt. Ex. 4, p. 16) He did not instruct Parsons to stay home from work or give him any work restrictions. (Jt. Ex. 4, p. 16) Parsons went back to work, without restrictions, on his next scheduled workday, on November 25, 2021. (Jt. Ex. 4, p. 16; Hrg. Tr. pp. 28, 53) After the work injury, Parsons worked about the same number of hours for Hy-Vee as he did before the work injury. (Hrg. Tr. p. 54)

Parsons continued to experience symptoms following his return to work. (Hrg. Tr. p. 27–28) Parsons felt like he "got put on hold for a while" by EMC after his trip to the ER because he could not get answers regarding care. (Hrg. Tr. p. 27) The defendants

provided Parsons no care for his foot between his trip to the ER on the night of the injury and March 1, 2016. (Hrg. Tr. p. 28)

On March 1, 2016, Parsons returned to see Davis. (Jt. Ex. 14, p. 17; Hrg. Tr. p. 28) Parsons complained of sharp and severe pain in the webspace between the second and third toe of his right foot. (Jt. Ex. 14, p. 17) He informed Davis he experienced the pain daily, mostly when walking and on occasion when trying to sleep. (Jt. Ex. 14, p. 17) Davis noted the pain radiated to the forefoot, but Parsons was not tender in that area. (Jt. Ex. 14, p. 17) Parsons denied numbness or tingling. (Jt. Ex. 14, p. 17)

Davis ordered more X-rays and compared them to those taken on the night of injury. (Jt. Ex. 14, p. 17) He again observed no evidence of fractures or dislocations in Parsons's foot. (Jt. Ex. 14, p. 17) Davis suspected a Morton's neuroma, which involves a thickening of the tissue around one of the nerves leading to the toes, and referred him to Edward Henrich, D.P.M., a podiatrist. (Jt. Ex. 14, p. 17)

On March 24, 2016, Parsons went to the Mason City Clinic and saw Dr. Henrich, who noted pain and Parsons complaining of feeling "pins and needles" in his toes. (Jt. Ex. 5, p. 26) Dr. Henrich felt a neuroma in the second interspace of the right foot was causing the pain. (Jt. Ex. 5, p. 27) He administered injections of Kenalog and Marcaine, and prescribed Gabapentin. (Jt. Ex. 5, p. 27) Dr. Henrich instructed Parsons to ice his foot twice a day for a week. (Jt. Ex. 5, p. 27)

Dr. Henrich recommended physical therapy (PT). (Hrg. Tr. p. 30; Jt. Ex. 9, p. 59) Parsons attended 12 PT appointments between May 18, 2016, and June 21, 2016. (Jt. Ex. 9, p. 59) After completing PT, the intensity and duration of Parsons's pain was reduced, leaving him able to complete most activities. (Jt. Ex. 9, p. 59) However, pain still limited Parsons's ability to squat, stand, or kneel for prolonged periods of time. (Jt. Ex. 9, p. 59)

Parsons followed up with Dr. Henrich on June 30, 2016. (Jt. Ex. 5, p. 28) Dr. Henrich noted Parsons continued to complain of pain and observed palpable tenderness in the second interspace of his right foot. (Jt. Ex. 5, pp. 28–29) He ordered magnetic resonance imaging (MRI) of Parsons's right foot. (Jt. Ex 5, p. 30) Dr. Henrich informed Parsons surgery to remove the neuroma was a possibility. (Jt. Ex. 5, p. 30) He took Parsons off work for one week. (Jt. Ex. 5, p. 30)

Parsons saw Dr. Henrich on July 26, 2021, to discuss the MRI. (Jt. Ex. 5, p. 33) He complained of ongoing pain. (Jt. Ex. 5, p. 33) The diagnosis shifted from the second interspace of Parsons's right foot to the third. (Jt. Ex. 5, p. 34) Dr. Henrich shared with Parsons that the MRI was negative for any significant plantar plate issues. (Jt. Ex. 5, p. 34) Dr. Henrich injected Parsons with Kenalog, Marcaine, and cortisone. (Jt. Ex. 5, p. 34) Parsons experienced short-term relief from the injections. (Hrg. Tr. p. 30)

On August 18, 2016, Parsons followed up with Dr. Henrich. (Jt. Ex. 5, p. 35) He reported "doing very well, at least 55% better." (Jt. Ex. 5, p. 35) Parsons informed Dr. Henrich his foot "does not hurt as much" and "he can get through an 8-hour shift, and

just the last little bit, he notices it. It burns and stings at times." (Jt. Ex. 5, p. 35) After examining Parsons, Dr. Henrich noted he had "no significant Mulder sign present in the actual 3rd interspace of the right foot" and "some mild swelling and tenderness upon deep palpation of the interspace." (Jt. Ex. 5, p. 35) Dr. Henrich instructed Parsons to get better footwear, with a wider and deeper sole, and to follow up as needed. (Jt. Ex. 5, p. 36)

As part of Utterback's supervisory duties, he walked the store every 30 or 40 minutes to see how night stock employees were performing their job duties. (Hrg. Tr. p. 69) Utterback noticed little difference in the way Parsons performed his duties immediately after the work injury but did not notice any issues as time went by. (Hrg. Tr. p. 71) Parsons did not ask Utterback for or take extra breaks due to the work injury. (Hrg. Tr. p. 72) Parsons did not tell Utterback about any issues sleeping due to his work injury. (Hrg. Tr. p. 72)

Parsons voluntarily quit his job with Hy-Vee effective August 25, 2016. (Jt. Ex. 3, p. 15) At hearing, Parsons credibly testified on the question of why he quit:

> I asked to be switched to days because I was having trouble after working nights, after I had hurt my foot, sleeping, because my foot would throb, burn, and I would not be getting enough sleep. And I kept getting the runaround about I will look into it. And I finally said -- he kept giving me the runaround, and I said I'm done. I couldn't keep going on anymore without hardly any sleep [. . .] because of my foot hurting so bad.

(Hrg. Tr. pp. 39–40) Utterback learned Parsons quit from his supervisor. (Hrg. Tr. p. 72)

Hy-Vee had no issues with Parsons's job performance at the time he voluntarily quit. (Hrg. Tr. p. 69) Utterback testified he had no reason to discipline or discharge Parsons at the time he quit. (Hrg. Tr. p. 73) When asked, Utterback shared his opinion as a supervisor that Parsons could have continued working for Hy-Vee had he not quit. (Hrg. Tr. p. 72)

The weight of the evidence shows Parsons did not discuss with Utterback the functional issues his work injury caused him while performing full-duty work for Hy-Vee after the work injury. Utterback did not observe any behavior by Parsons that reflect the pain he was in and difficulties full-duty work as a night stocker at Hy-Vee caused him. Parsons shared his concerns with other Hy-Vee management and ultimately quit because management was unresponsive.

After quitting at Hy-Vee, Parsons worked for Pizza Ranch, washing dishes. (Hrg. Tr. pp. 19, 41; Def. Ex. A, p.4) He earned $11,001.00 working there in 2017. (Hrg. Tr. p. 59) The evidence in the record leaves it is unclear why Parsons's employment at Pizza Ranch ended.

Parsons also worked for Stateline Co-op in Fenton, dumping grain from semis for about six weeks in the autumns of 2016 and 2018, with a chair to sit on in between semi loads. (Hrg. Tr. p. 41–42; Def. Ex. A, p. 4) At the time of hearing, Parsons was working

for $10.00 per hour part-time on his Duane Dittmer's farm, doing an array of jobs, from field work to mowing the lawn to working in the shop. (Hrg. Tr. pp. 19, 41) In 2018, Parsons reported income of $5,755.00 from working at the farm. (Hrg. Tr. p. 60) There is no evidence in the record regarding his earnings in 2019 or 2020. At the time of hearing, Parsons had not applied for any other jobs. (Hrg. Tr. p. 61) He credibly testified he intended to look for other jobs after the COVID-19 pandemic was over. (Hrg. Tr. p. 59)

Parsons did not seek care for his injury until he returned to Dr. Henrich on April 6, 2017. (Jt. Ex. 5, p. 37) He told Dr. Henrich was "doing okay" and "the medication did not do a lot for him." (Jt. Ex. 5, p. 37) Dr. Henrich noted his foot "does look okay and feels good with less pain and less discomfort. It is still just somewhat problematic. He seems to be just touchy in both the 2nd and 3rd interspaces on this right side with mild metatarsalgia. Mild arthritic pain." (Jt. Ex. 5, p. 38) He further opined that "this is really kind of hard to discern. It does not sound like as much neuroma pain as it is arthritic pain. He may even be getting some small vessel disease that might be causing some issues." (Jt. Ex. 5, p. 38)

On September 14, 2017, Parsons followed up with Dr. Henrich, complaining of ongoing foot tenderness. (Jt. Ex. 5, p. 40) Dr. Henrich identified Parsons's problems as peripheral neuropathy and degenerative arthritis. (Jt. Ex. 5, p. 41) He noted:

> The patient does have discomfort in his feet. He has a lot of problems from the crush injury 2 years ago. He does not have a lot of swelling, but burning, stinging, numbness, tingling, and shooting sensation in the ball of his right foot. Mild decreased range of motion to the joints because of the arthritic change.

(Jt. Ex. 5, p. 41) Parsons filled a prescription the next day, but did not do so again in 2017 or 2018. (Jt. Ex. 13, p. 78; Jt. Ex. 14, p. 80)

Eric Zisoffe of EMC sent medical records to Douglas Martin, M.D., accompanied by letters dated September 21, 2018, and October 2, 2018 (not in evidence), seeking his diagnosis of Parsons's condition. (Jt. Ex. 6, p. 43) Dr. Martin pointed out Zisoffe indicated Parsons underwent care with a neurologist at the Center for Neurosciences, Orthopedics and Spine, P.C., but there were no records from the provider included among those sent for review. (Jt. Ex. 6, p. 43) There are no such records in evidence either.

In Dr. Martin's letter in response to EMC, dated November 1, 2018, he opined:

> One of the issues here is that I am not sure that I necessarily am comfortable with having a firmly established diagnosis. Some records suggest that there is a Morton's neuroma in the second interspace. Other[s] suggest that it is in the third interspace. There is also a note that simply refers to the problem as "peripheral neuropathy."

> Thus, it makes it very difficult to analyze this situation if a firm diagnosis has not yet been established.

(Jt. Ex. 6, p. 44) He then summarized the typical course of treatment for each diagnosis and opined, if Parsons received the non-surgical conservative care detailed, he should be at maximum medical improvement (MMI). (Jt. Ex. 6, p. 44)

On January 3, 2019, Parsons saw Michael Jacoby, M.D. (Jt. Ex. 7) This is the first time he received care for his injury since seeing Dr. Henrich on September 14, 2017. Dr. Jacoby noted:

> Multiple evaluations and treatments. Still has trouble. May awaken at night with burning, throbbing, and aching pain. Constant pain. Pain is in ball and toes, like a sock distribution over the end of the foot. Pain is worst in the cold. In shower, slight pressure against toes helps. [. . .] Has to be cautious going down steps as pain may become worse. Same is true upon standing. Sitting in recliner helps. At best, pain is 5 [on a scale with zero as no pain and ten as highest level of pain], worst 9-10, normally 5-6. Currently an 8. No change in color of foot but it feels colder. Prescribed medications have not helped. Cortisone injection not helpful. Foot not necessarily weak. Has noted increased pain with touch. TENs unit helps a little.

(Jt. Ex. 7, p. 46)

Dr. Jacoby diagnosed neuropathic pain. (Jt. Ex. 7, p. 47) He opined he saw "no objective features" for complex regional pain syndrome (CRPS), which he deemed "a definite possibility after a 'crush' type of injury." (Jt. Ex. 7, p. 47) He also addressed the possibility of degenerative arthritis: "Whereas this may cause symptoms, the touch allodynia he characterizes may be atypical for such." (Jt. Ex. 7, p. 47) Dr. Jacoby prescribed a more aggressive titration and dosing of Gabapentin due to it being previously ineffective. (Jt. Ex. 7, p. 47)

Dr. Jacoby decided Parsons should undergo electrodiagnostic testing. He did so on January 25, 2019. (Jt. Ex. 7, pp. 48–49) According to Dr. Jacoby, "Evidence to support a peripheral neuropathy in the [lower extremities was] not found." (Jt. Ex. 7, p. 49)

Parsons followed up with Dr. Jacoby on February 14, 2019. (Jt. Ex. 7, p. 50) Parsons reported the Gabapentin "helped a little." (Jt. Ex. 7, p. 50) Dr. Jacoby prescribed Lyrica and referred him for pain management. (Jt. Ex. 7, p. 51)

On April 3, 2019, Parsons went to Central States Medicine for an evaluation of pain in his right ankle, foot, and toes. (Jt. Ex. 8, p. 54) He rated his pain level as "moderate." (Jt. Ex. 8, p. 54) Parsons shared that his pain interfered with some daily activities. (Jt. Ex. 8, p. 54)

Christian Ledet, M.D., examined Parsons and noted his right toes had normal range of motion and stability. (Jt. Ex. 8, p. 56) His right ankle and foot demonstrated pain with palpation of soft tissue, but no swelling, effusion, masses, defects, crepitation, or calor. (Jt. Ex. 8, p. 56) On CRPS, Dr. Ledet opined in pertinent part:

> With persistent foot pain after this crush injury concerns arise in regards to the diagnosis. Persistent pain can result in the diagnosis of [CRPS].
>
> [CRPS] is a diagnosis that is associated with a range of injuries and trauma. The CRPS constellation of symptoms occurs predominately in the extremities and consists of burning pain accompanied by edema and color change. The syndrome is understood to be a neuropathic pain syndrome that includes sensitization of the peripheral and central nervous systems in addition to regional inflammation. Immobilization has been demonstrated to produce symptoms and signs of similar findings. Diagnostic criteria and tests for CRPS have been suggested and there continues to be debate about the criteria that establish the diagnosis. There is no "gold standard" diagnostic test to confirm or eliminate the diagnosis of CRPS. Efforts to externally validate diagnostic criteria for this CRPS have indicated that the current guidelines available to clinicians for the diagnosis of CRPS have low specificity and may lead to over diagnosis of this condition. Differentiation between a diagnosis of CRPS and "regional pain of undetermined origin" is difficult to validate with objective metrics. In accordance with guidance provided by the Iowa Worker's Compensation Commissioner, I have utilized criteria described on page 496, of the AMA Guides to the Evaluation of Permanent Impairment, fifth edition, table 16-16, objective diagnostic criteria for CRPS.

(Jt. Ex. 8, p. 58)

Despite this discussion of CRPS and reference to the AMA Guides to the Evaluation of Permanent Impairment (Guides), Dr. Ledet did not engage in an analysis of the factors for diagnosing CRPS or make an express finding on the question of CRPS. (Jt. Ex. 8, p. 58) However, under the "current problems," the record from the visit identifies "pain in right foot" and "encounter for observation for other suspected diseases and conditions ruled out." (Jt. Ex. 8, p. 54) Thus, it appears Dr. Ledet might have ruled out CRPS, though he does not expressly state so in the records or provide any rationale for doing so. (Jt. Ex. 8, pp. 54–58)

Dr. Ledet felt it was unnecessary for Parsons to continue to travel to Des Moines for ongoing care. (Jt. Ex. 8, p. 58; Hrg. Tr. pp. 37) Consequently, Dr. Ledet transferred care back to Davis at the Algona Clinic. (Jt. Ex. 4, p. 20; Hrg. Tr. p. 37) Parsons returned to see Davis on April 26, 2019. (Jt. Ex. 4, p. 20) Davis noted:

> Vital signs are reviewed. His right foot shows normal hair pattern, including both the dorsum of his foot and dorsum of his toes. He has easily palatable dorsalla pedis and posterior tibial pulses. Skin is intact

> with no rashes. He has good sensation to light touch. There is a sense of mild hyperesthesia on the lateral aspect of the dorsum of his forefoot. Ankle appears to normal range of motion. There is no swelling. He has tenderness to compression both the plantar aspect and dorsum of the distal metatarsal heads.

(Jt. Ex. 4, p. 20) Davis reviewed Parsons's prescribed medications with him. (Jt. Ex. 4, p. 20)

Parsons followed up with Davis on May 28, 2019. (Jt. Ex. 4, p. 21) Davis noted Parsons "continues to have significant sensitivity [to] even the slightest bump on the dorsum of his foot." (Jt. Ex. 4, p. 21) Parsons rated his pain as eight on the zero-to-ten scale and described it as typical. (Jt. Ex. 4, p. 21) Davis found his conditionally largely unchanged from his previous appointment. (Jt. Ex. 4, p. 21)

The defendants propounded interrogatories on Parsons during the litigation of this case. (Def. Ex. A) Parsons provided answers, signed and notarized on July 11, 2019. (Def. Ex. A) In them, Parsons described the symptoms he had experienced between the date of injury and date of the interrogatory answers as "pain in [his] toes and across the bottom of [his] foot right where the toes end" as well as "burning and aching all the time." (Def. Ex. A, p. 2)

Davis next examined Parsons on August 21, 2019. (Jt. Ex. 4, 23) Parsons rated his pain as five out of ten, which was typical at the time. (Jt. Ex. 4, p. 23) Davis noted Parsons and his wife took a trip to California to see their grandchild, during which he found "cold water aggravates the pain in his foot dramatically" and he "had significant trouble walking on any uneven ground and particularly on rocky ground." (Jt. Ex. 4, pp. 23–24) Davis noted the following after his physical examination of Parsons:

- Full and normal range of motion of the ankle;
- The dorsum of the right forefoot is exquisitely tender to even the lightest touch;
- Any palpation or compression across the distal one-half of all metatarsals causes significant discomfort, withdrawal, and verbal response to pain; and
- Exquisite tenderness with any compression applied to the metatarsal heads during plantar examination. (Jt. Ex. 4, p. 24)

Sunil Bansal, D.O., performed an independent medical examination (IME) of Parsons that included an in-person exam on March 18, 2020, and a review of medical records. (Jt. Ex. 10) Dr. Bansal's examination of Parsons's right foot and ankle showed:

- The foot was cooler to the touch than the left foot;
- The dorsum of the foot had a reddish hue;
- Diffuse tenderness over the foot;
- Swelling of the dorsal foot into the lateral malleolus noted;
- Doralis pedis pulses +2;

- Allodynia over the dorsum and plantar aspect of the foot;
- 3/5 strength with eversion and inversion; and
- 4/5 strength with dorsiflexion and plantar flexion. (Jt. Ex. 10, p. 68)

Dr. Bansal diagnosed Parsons with "neuropathic pain" in the right foot and ankle "with features of [CRPS]." (Jt. Ex. 10, p. 69) On causation, he opined, "The mechanism of a loaded pallet jack running over his right foot is consistent with his right foot crush injury, and the development of neuropathic pain syndrome/complex regional pain syndrome." (Jt. Ex. 10, p. 69) Dr. Bansal did not use the criteria in the Fifth Edition of the AMA Guides to diagnose Parsons; rather, he used the "Budapest Criteria," which he explains as follows:

> To address limitations secondary to the variance of CRPS criteria, an international consensus meeting was held in Budapest in 2003 to review issues related to the CRPS diagnosis with the goal of recommending improvement to the IASP criteria. The resulting proposal for modified diagnostic criteria for CRPS, or the "Budapest Criteria," was based primarily on empirically derived criteria published previously. Derived from this was the most sensitive predictor criteria for CRPS. This is also the criteria used by the most recent edition of the AMA Guides[, the Sixth Edition].

(Jt. Ex. 10, pp. 69–70)

Dr. Bansal applied the Budapest Criteria as follows:

1. Continuing pain, which is disproportionate to any inciting event.

   yes

2. Must report at least one symptom in *three of the four* following categories:

   - *Sensory:* reports of hyperesthesia and/or allodynia.

     yes

   - *Vasomotor:* reports of temperature asymmetry and/or skin color changes and/or skin color asymmetry

     yes

   - *Sudomotor/edema:* reports of edema and/or sweating changes and/or sweating asymmetry.

     yes

- *Motor/trophic:* reports of decreased range of motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).

  yes

3. Must display at least one sign at time of evaluation in *two or more* of the following categories:

   - *Sensory:* evidence of hyperalgesia (to pinprick) and/or allodynia (to light touch and/or deep somatic pressure and/or joint movement).

     yes

   - *Vasomotor:* evidence of temperature asymmetry and/or skin color changes and/or asymmetry.

     yes

   - *Psydomotor/edema:* evidence of edema and/or sweating changes and/or sweating asymmetry.

     yes

   - *Motor/trophic:* evidence of decreased range of motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin)

     yes

4. There is no other diagnosis that better explains the signs and symptoms.

   Correct.

(Jt. Ex. 10, p. 70 (citing Harden RN et al. *Validation of proposed diagnostic criteria (the "Budapest Criteria") for Complex Regional Pain Syndrome*, Pain. 2010 Aug; 150(2):288-74)).

Dr. Bansal assigned Parsons the permanent work restrictions of no prolonged standing or walking greater than 15 minutes at a time and no walking on stairs, ladders, or uneven ground. (Jt. Ex. 10, p. 71) He recommended long-term pain management for Parsons. (Jt. Ex. 10, p. 71) On the question of permanent impairment, Dr. Bansal opined:

> Utilizing the AMA Guides of Evaluation for Permanent Impairment, Fifth Edition, we find that CRPS of the lower extremity is rated per Table 13-15.

> His functional limitations are best defined by the criteria set forth for Class 2 impairments, as well as some from Class 3. He has difficulty walking on uneven surfaces. Therefore, he is assigned a 10% whole person impairment. This is a stand-alone impairment, and accounts for any other impairment to the foot.

(Jt. Ex. 10, p. 69)

Parsons credibly testified about how the work injury and resulting physical limitations have impacted his life. He agrees with the work restrictions assigned by Dr. Bansal. (Hrg. Tr. p. 50) Based on his experience living with the injury and activities that aggravate it, Parsons credibly asserted he would be unable to work an eight-hour shift while standing. (Hrg. Tr. p. 45)

On a typical day, Parsons experiences tingling, coldness, and burning in his foot. (Hrg. Tr. p. 45) He credibly testified he can stand for 15 minutes at the most before he must sit down due to the injury. (Hrg. Tr. p. 45) Because his right foot gets colder than his left foot, he wears more than one pair of socks on his right foot in cold weather to try to keep it from getting too cold. (Hrg. Tr. p. 45)

Further, Parsons described the problems he has walking because of the work injury. (Hrg. Tr. p. 45) His work injury prevents him from walking long distances. (Hrg. Tr. p. 45) Walking on uneven ground is difficult because it aggravates his foot injury. (Hrg. Tr. p. 45) He avoids climbing ladders because climbing them worsens his symptoms. (Hrg. Tr. p. 45) Parsons uses stairs with his foot sideways to mitigate the burning caused by using them with his foot facing straight ahead. (Hrg. Tr. p. 45)

Parsons is the proud grandpa to eleven grandchildren, one of whom has sadly passed away. (Hrg. Tr. p. 44) Before the injury, Parsons enjoyed playing with them games like kickball, football, basketball, and soccer. (Hrg. Tr. p. 44) But after the injury, he can no longer do so without aggravating his injury. (Hrg. Tr. p. 44) The same is true when he attempts to dance with his wife. (Hrg. Tr. p. 44) Parsons can dance for a little bit, but then his foot starts to tingle, burn, and his kneecap will go numb. (Hrg. Tr. p. 44)

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injuries at issue in this case occurred before July 1, 2017, the Iowa Workers' Compensation Act in effect before the 2017 amendments applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. December 11, 2020).

1. Permanent Disability.

The parties agree Parsons sustained a permanent disability resulting from the work injury to his right foot. They dispute the nature and extent of that disability. Parsons contends the work injury caused CRPS. The defendants disagree, arguing the

evidence shows Parsons did not sustain CRPS, only a functional impairment to the lower extremity, citing Holstein Electric v. Breyfogle in support of their position the injury is limited to the foot. 756 N.W.2d 812 (Iowa 2008).

"In this state, the right to workers' compensation is purely statutory." Downs v. A & H Const., Ltd., 481 N.W.2d 520, 527 (Iowa 1992) (citing Caylor v. Employers Mut. Casualty Co., 337 N.W.2d 890, 893 (Iowa App. 1983)). "The primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit." McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980) (citing Cedar Rapids Cmty. Sch. Dist. v. Cady, 278 N.W.2d 298, 299 (Iowa 1979); Wetzel v. Wilson, 276 N.W.2d 410, 411-12 (Iowa 1979); and Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188, 190 (Iowa 1968)). A statutory provision governing workers' compensation in Iowa "is not to be expanded by reading something into it that is not there." Downs, 481 N.W.2d at 520 (citing Cady, 278 N.W.2d 298).

Iowa Code section 85.34(2) governs permanent partial disabilities. The statute lists certain body parts in a schedule, including the foot and leg, and a catch-all that governs injury to any body part not listed. See Iowa Code § 85.34(2). Disabilities to the scheduled members are compensated based only on the injured employee's functional loss and without consideration of the impact on the injured employee's earning capacity. Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983) (citing Graves v. Eagle Iron Works, 331 N.W.2d 116, 117–18 (Iowa 1983)). However, under Barton v. Nevada Poultry Co. and its progeny, an injury to a scheduled member that causes CRPS is considered an injury to the nervous system, which is not included in the statutory schedule, and is therefore an unscheduled injury, making any resulting disability industrial in nature. 110 N.W.2d 660 (Iowa 1961); see also Collins v. Dep't of Human Serv., 529 N.W.2d 627, 628–30 (Iowa App. 1995) (discussing, but ultimately not addressing, reflex sympathetic dystrophy—or CRPS, a name by which the condition is also known—as an unscheduled injury triggering industrial disability analysis). Thus, the question of the nature and extent of permanent partial disability hinges on whether the crush injury caused CRPS.

The claimant has the burden to prove by a preponderance of the evidence that the alleged injuries arose out of and in the course of employment with the employer. Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 253 (Iowa 2010) (citing Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996)); see also Douglas v. Vermeer Mfg., File No. 5062611 (App., October 23, 2019) (citing Ciha, 552 N.W.2d at 150 and Miedema, 551 N.W.2d at 311). "Employers may raise any number of arguments to contest an employee's assertion that an injury arose out of and in the course of employment." Vegors, 786 N.W.2d at 254. Such contestations do not shift the burden of proof on causation, which the claimant retains. Id.

"Medical causation 'is essentially within the domain of expert testimony.'" Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011) (quoting Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995)).

> With regard to expert testimony[,] [t]he commissioner must consider [such] testimony together with all other evidence introduced bearing on the causal connection between the injury and the disability. The commissioner, as the fact finder, determines the weight to be given to any expert testimony. Such weight depends on the accuracy of the facts relied upon by the expert and other surrounding circumstances. The commissioner may accept or reject the expert opinion in whole or in part.'

Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 560 (Iowa 2010) (quoting Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 752 (Iowa 2002)).

The defendants contend that because Dr. Bansal used the Budapest Criteria for diagnosing CRPS instead of the factors listed in the Fifth Edition of the AMA Guides, his opinion should be given less weight. This argument is unavailing to a pre-July 1, 2017 injury. The version of rule 876 IAC 2.4 in effect before the 2017 amendments and applicable in this case states:

> **The Guides to the Evaluation of Permanent Impairment, Fifth Edition, published by the American Medical Association are adopted as a guide for determining permanent partial disabilities under Iowa Code section 85.34(2) "*a*" to "*s*."** The extent of loss or percentage of permanent impairment may be determined by use of the Fifth Edition of the guides and payment of weekly compensation for permanent partial scheduled injuries made accordingly. Payment so made shall be recognized by the workers' compensation commissioner as a prima facie showing of compliance by the employer or insurance carrier with the foregoing sections of the Iowa workers' compensation Act. **Nothing in this rule shall be construed to prevent the presentations of other medical opinions or other material evidence for the purpose of establishing that the degree of permanent disability to which the claimant would be entitled would be more or less than the entitlement indicated in the Fifth Edition of the AMA guides.**

(emphasis added).

The Commissioner has made clear that under the rule, the AMA Guides are "a useful tool in evaluating disability," but "only a guide," the use of which "is not binding on the agency." Ament v. Quaker Oats Company, File Nos. 5044298, 5044299 (App. March 17, 2016); see also Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834, 839–40 (Iowa 1986) (holding the agency is not bound to follow the AMA Guides under the version of what is now rule 876 IAC 2.4 applicable in this case). Thus, even on the question of permanent disability, the AMA Guides are not binding on the agency for cases that stem from work injuries before July 1, 2017.

It is axiomatic that if the AMA Guides are not binding on the question of permanent impairment, the only use expressly cited in the rule, their use is not mandatory on the question of diagnosis or causation, uses not found in the rule's text.

See Kucera v. Baldazo, 745 N.W.2d 481, 487 (Iowa 2008) (holding that, under the longstanding principle of statutory construction *expressio unius est exclusion alterious*, legislative intent is expressed by exclusion and inclusion alike with express mention of one thing implying exclusion of another)). This is not to say that a doctor or the agency is prohibited from using the AMA Guides when considering whether a claimant has CRPS. The rule and principles of interpretation make clear only that the rule does not create a requirement to use only the AMA Guides to diagnose CRPS. Consequently, there is no basis in the law governing this case for the agency to conclude that an expert's failure to use the AMA Guides when diagnosing CRPS undermines the credibility of the opinion.

Since under Iowa law Dr. Bansal's diagnosis cannot be dismissed out of hand for not using the Fifth Edition of the AMA Guides, analysis turns to the three doctors who address the question of a possible CRPS diagnosis. On January 3, 2019, Dr. Jacoby opined on whether Parsons had CRPS. Dr. Ledet referenced CRPS in a record from his examination of Parsons on or about April 3, 2019. Dr. Bansal examined Parsons during an in-person exam on March 18, 2020, and issued an IME report containing his CRPS diagnosis dated March 23, 2020.

On January 3, 2019, Dr. Jacoby opined Parsons's showed "no objective features" of CRPS even though he observed Parsons's foot was cool to the touch and under both the AMA Guides and the Budapest Criteria, cool skin temperature is among the objective diagnosis criteria. The limited explanation of Dr. Jacoby's conclusory statement and the fact that it apparently runs at least partially contrary to the two frameworks used for diagnosing CRPS by other experts, makes the record unclear what Dr. Jacoby believes the "objective features" of CRPS to be. The conclusory nature of his opinion, apparent failure to consider skin temperature as a factor, and overall lack of information with respect to what factors Dr. Jacoby considered make his opinion unpersuasive.

Dr. Ledet included a paragraph on CRPS in the medical records from his examination of Parsons. However, Dr. Ledet did not expressly discuss why he believed or did not believe Parsons had CRPS. Under the AMA Guides, the presence of eight criteria triggers the CRPS diagnosis. Some of the factors are addressed in Dr. Ledet's notes. For example, edema is a vasomotor change listed as a factor in the AMA Guides and Dr. Ledet noted no swelling or effusion in the area of Parsons's right foot and ankle. However, it is unclear how many of the factors listed in the AMA Guides Dr. Ledet specifically considered and what his conclusion was after doing so. This is problematic because the substance of Dr. Ledet's records does not include an opinion expressly stating whether he believes with a reasonable degree of medical certainty whether he believes Parsons had CRPS.

The defendants attempt to downplay the lack of an express opinion in the records from Dr. Ledet's examination by citing the codes in them for right-foot pain and ruling out a possible condition. According to the defendants, they suggest Dr. Ledet ruled out CRPS and offered an alternative diagnosis. One problem with this argument is that the diagnosis of right foot pain does not in and of itself rule out CRPS. Absent an

express statement ruling out CRPS, the use of the code is inconclusive. For if the diagnosis was right foot pain of a type that allowed CRPS to be ruled out, why did Dr. Ledet not include an express finding that identified the condition in the records after the paragraph on CRPS?

Further, the record does not identify who chose the codes, when the person did so, or why. It could have been Dr. Ledet, but it also could have been someone else, perhaps in an administrative role, with no formal medical education. These possibilities make a determination on who chose the codes, and what to infer from the choice, speculative. Thus, there is an insufficient basis in the record from which to conclude Dr. Ledet entered the coding information with the intention to represent his opinion that Parsons did not have CRPS. The codes are not enough to support the conclusion Dr. Ledet believes with a reasonable degree of medical certainty Parsons did not have CRPS, given his choice to not expressly state such an opinion in the medical records after including a paragraph about CRPS and its diagnosis. Based on the evidence, it is at least as likely Dr. Ledet did not feel he could rule out CRPS at the time of the examination.

"An inference is not legitimate if it is based upon suspicion, speculation, conjecture, surmise, or fallacious reasoning." Godfrey v. State, 962 N.W.2d 84 (Iowa 2021). For the reasons discussed above, it would be a bridge beyond the bounds of inference to find Dr. Ledet issued an opinion on CRPS, given the substance of the records regarding his examination. Concluding Dr. Ledet's expert opinion was, in fact, that Parsons did not have CRPS requires the type of surmise inappropriate for an agency acting as a tribunal. The substance of the medical records from Dr. Ledet's appointment is therefore unpersuasive on the question of whether Parsons had CRPS at the time of his appointment with Dr. Ledet.

In Dr. Bansal's report, he notes that the most recent edition of the AMA Guides uses the Budapest Criteria. The defendants' attack on the Budapest Criteria for CRPS diagnosis focuses exclusively on the fact that the Fifth Edition of the AMA Guides uses a different framework for diagnosing CRPS. The defendants do not address the fact, as discussed above, that agency rules identify the Fifth Edition for use in determining *permanent disability* and make no reference to diagnosis. Nor do the defendants refute the discussion in Dr. Bansal's IME report of the Budapest Criteria as an up-to-date CRPS diagnosis model, which enjoys medical consensus. The defendants put forth no other argument or evidence for giving the Fifth Edition of the AMA Guides more weight than the Budapest Criteria. The lack of evidence in the record undermining the Budapest Criteria as a valid diagnostic framework for CRPS lends credence to Dr. Bansal's summary of the Budapest Criteria as a valid method for diagnosing CRPS. Consequently, under Iowa law and the record in this case, the Budapest Criteria constitute a viable framework for diagnosing CRPS.

The defendants also question the veracity of Dr. Bansal's observations regarding Parsons's symptoms relevant to the Budapest Criteria. They contend Dr. Bansal's observations are not credible because they differ from some of the recorded observations of the treating physicians and Davis, in the years before Dr. Bansal's

examination. They specifically identify Dr. Bansal's findings of swelling, reddish hue in color, and reduced range of motion. The defendants take no issue with the other findings relating to the Budapest Criteria that Dr. Bansal made during his examination.

According to the defendants, Dr. Bansal's recorded findings of swelling, red skin color, and reduced range of motion cast his opinion into question. However, by comparing Dr. Bansal's observations to those of other providers, they are comparing apples to oranges. There is no medical evidence in the record that is contemporary to Dr. Bansal's and casts doubt on the accuracy of his findings. Put otherwise, there is an insufficient basis in the evidence from which to conclude Dr. Bansal misrepresented any of his observations based on comparisons between his observations and those of the defendants' chosen doctors during Parsons's years-long course of treatment.

Further, Dr. Bansal had no reason to make misrepresentations regarding swelling, skin color, or reduced range of motion. Under the Budapest Criteria, diagnosis of CRPS is appropriate if an individual has at least on symptom in three of the four following categories:

- **Sensory:** hyperesthesia and/or allodynia;
- **Vasomotor:** temperature asymmetry, skin color changes, and/or skin color asymmetry;
- **Sudomotor/edema:** edema and/or sweating changes and/or sweating asymmetry; and/or
- **Motor/trophic:** decreased range of motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).

Dr. Bansal found allodynia, so the sensory category is met. He also found temperature asymmetry and skin color change/asymmetry, so the vasomotor category is satisfied twice over and there is consequently no need to embellish any observation regarding skin color. Dr. Bansal also noted the motor dysfunction of weakness in satisfaction of the motor/trophic category. Thus, three of the four categories of the class implicated by the defendants' accusations are satisfied independent of lost range of motion or swelling. Under the Budapest Criteria, three of four is sufficient for a CRPS diagnosis. Therefore, Dr. Bansal could have diagnosed Parsons with CRPS independent of his observations regarding swelling, skin color, and reduced range of motion, by using those of his observations unchallenged by the defendants. This reality makes the defendants' attack on Dr. Bansal's credibility in this case all the more unavailing.

For the reasons discussed above, Dr. Bansal's recorded observations of Parsons's physical condition are credible. His diagnosis with respect to CRPS is the most persuasive because of his detailed findings and clear reasoning. Parsons has met his burden of proof on the question of CRPS. The evidence establishes it is more likely than not the work injury at Hy-Vee caused CRPS. Further, Parsons's credible testimony with respect to how the symptoms caused by his injury impact his daily functions,

including those implicating his ability to work, supports the conclusion, by a preponderance of the evidence, that the work restrictions Dr. Bansal identified in his IME report are appropriate.

Because a preponderance of the evidence shows Parsons's work injury at Hy-Vee caused CRPS, an unscheduled injury. "The amount of compensation for an unscheduled injury resulting in permanent partial disability is based on the employee's earning capacity." Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 526 (Iowa 2012) (citing Broadlawns Med. Ctr. v. Sanders, 792 N.W.2d 302, 306 (Iowa 2010)). The assessment of a claimant's earning capacity is based on multiple 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 of the claimant, the claimant's inability, because of the injury to engage in employment for which the claimant is fitted, and the employer's inability to accommodate the claimant's functional limitations. Id.; IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632–33 (Iowa 2000); Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

Parsons was 58 years old at the time of hearing. He's been found legally blind due to cone dystrophy, which caused him to surrender his driver's license. Consequently, Parsons cannot drive. This limits his ability to drive as part of his job duties and commute to work.

Parsons dropped out of high school in the 11th grade. At the time of hearing, he had not earned a high school equivalency diploma (HSED). Consequently, it is more likely than not he has not obtained any postsecondary degrees or certificates. Moreover, because of his disability, Parsons has a limited ability to use the keyboard on a computer.

Dr. Bansal assigned Parsons a 10 percent functional impairment to the whole body due to his foot injury and CRPS. He also gave Parsons the following permanent work restrictions:

- No prolonged standing or walking greater than 15 minutes at a time; and
- No walking on stairs, ladders, or uneven ground.

These medical opinions are credible and are adopted as part of this decision.

Under the Iowa Workers' Compensation Act, a claimant's lack of motivation to find work may count against the extent of industrial disability. West Side Transport, Inc. v. Fishel, 746 N.W.2d 280, *4–*5 (Iowa App. 2008) (Table); Ehlinger, 237 N.W.2d at 792; Malget v. John Deere Waterloo Works, File No. 5048441 (Remand Decision, May 23, 2018). The weight of the evidence in this case shows Parsons is motivated to work. Parsons dropped out of high school after his dad passed away because he had to work to help support his family. After turning 18, he worked for a farmer, performing field work and helping with livestock. Then he worked for a hatchery before his diagnosis of cone

dystrophy and the determination it made him legally blind and eligible for Social Security disability benefits.

After Parsons was diagnosed with cone dystrophy, he went to work part-time on a friend's farm. He worked for about a year and a half at a junk yard, but worked at his friend's farm for the remainder of the time between leaving the hatchery and starting at Hy-Vee. After quitting at Hy-Vee, he returned to restaurant work with Pizza Ranch, washing dishes. After his employment with Pizza Ranch ended, Parsons worked at the co-op performing seasonal work that was not physically demanding. He has since returned to working part-time at his friend's farm, from which he reported earnings around half what he earned at Hy-Vee and Pizza Ranch.

Moreover, Parsons returned to work at Hy-Vee a few days after having his foot crushed by a hand cart with about 2,000 pounds of canned goods on it despite the aggravation of symptoms doing so caused him. He worked full duty for about ten months, while waiting for the defendants to authorize additional care for his injury and the symptoms it caused him, including pain that negatively affected his sleep. Continuing to work while experiencing pain and lost sleep demonstrates a high motivation to work.

The defendants argue the fact that he returned to work following the crushing of his foot and performed his regular duties while working his regular hours for ten months weigh against a finding of industrial disability. However, the weight of the evidence establishes Parsons experienced symptoms that impacted his sleep after returning to work and the defendants delayed authorizing additional care to address his complaints. It would be inappropriate to hold Parsons's willingness and attempt to return to full-duty work against him, given the fact that doing so worsened his symptoms and the defendants delayed authorization of additional care during this time period despite his complaints, which combined to cause his resignation from Hy-Vee.

After quitting Hy-Vee because of his symptoms, the resultant loss of sleep, and the company's lack of response to his request to change shifts, Parsons obtained employment at Pizza Ranch, a co-op, and a friend's farm, where he was working part-time at the time of hearing. At hearing, Parsons credibly testified he intended to look for another job after the COVID-19 pandemic subsided, a reasonable position that does not implicate his motivation because he had a part-time job working at his friend's farm at the time. The evidence establishes Parsons has been motivated to work from a young age to present.

Despite Parsons's motivation, the record establishes the work injury and resulting restrictions will negatively impact his earning capacity because of limitations on the types of jobs he can physically perform. Because of the restrictions on standing and walking he received after his employment with Pizza Ranch ended, Parsons is unlikely to return to restaurant work of the type he performed in high school and with Pizza Ranch. Those restrictions, combined with the limitations on ladders, stairs, and uneven ground, make a return to field and animal work on farms unlikely as well. Parsons's work restrictions also make a return to stocking at Hy-Vee or elsewhere improbable.

Parsons's sight impairment makes types of sedentary work a bad fit. For example, he cannot see well enough to use a keyboard, which makes cashier work a poor fit. His limited educational background and sight limitations make office work on computers highly unlikely.

Parsons could conceivably return to the hatchery. He is also able to perform at least some farmhand duties on his friend's farm. The evidence is unclear on what work Parsons performed in 2018 on his friend's farm, before Dr. Bansal's restrictions, or if he could continue to perform that job within those restrictions.

For the reasons discussed above, the evidence establishes it is more likely than not that Parsons's has sustained a fifty (50) percent industrial disability from the work injury.

2. Reimbursement for Independent Medical Examination (IME).

Before September 1, 2021, the Commissioner recognized a distinction between a medical opinion on causation and one on the nature and extent of permanent disability when determining whether the cost of an IME may be reimbursed to the claimant under Iowa Code section 85.39. Barnhart v. John Deere Dubuque Works of Deere & Company, File No. 5065851, p. 2 (App. March 27, 2020) (citing Reh v. Tyson Foods, Inc., File No. 5053428 (App. March 26, 2018)); see also Phillips v. Kimberley Farms, Inc., File No. 5057945, p. 15 (Arb. April 24, 2019) ("The Commissioner has made it abundantly clear that a medical opinion on some other issue such as causation or restrictions is not the equivalent of an impairment rating."). Under the agency interpretation of the statute, an injured employee could only obtain reimbursement for an IME in response to an opinion on permanent impairment by an employer-chosen doctor. Id. No reimbursement was available if the employer-chosen doctor opined only on causation. Id.

The Iowa Court of Appeals considered the agency's interpretation of Iowa Code section 85.39 with respect to whether an employer must pay for an IME of an injured employee when the employer has not obtained an impairment rating in Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa App. September 1, 2021) (slip copy) (application for further review pending before the Iowa Supreme Court as of November 18, 2021). The court reversed the agency decision denying IME reimbursement because the employer-chosen doctor had opined only on causation and had not addressed what, if any, disability the claimant had sustained. Id. at *2–*5. The court determined the agency had erroneously interpreted Iowa Code section 85.39 and caselaw construing it. Id. at *5 ("We see no conflict applying our supreme court's interpretation of section 85.39 in *Young* to a finding that Dr. Paulson's opinion on lack of causation was tantamount to a zero percent impairment rating and, in fact, we find such interpretation compelling."). Thus, the court concluded that an employer-chosen doctor's opinion finding that an alleged injury did not arise out of and in the course of employment constitutes an opinion of no disability and the cost of an IME sought due to disagreement with such an opinion is reimbursable under section 85.39.

This case differs somewhat from Kern. In Kern, the defendants obtained an opinion on causation that was silent on the question of impairment, "the clear effect" of which, the court held, "was a finding of no compensable permanent disability." 2021 WL 3890603 at *4. In the current case, the defendants did not obtain an impairment rating, but do not dispute that the stipulated work injury caused Parsons some permanent disability; they dispute only whether the permanent disability is limited to a functional impairment of Parsons's foot or is an industrial disability due to CRPS. Moreover, the defendants ask the agency to use Dr. Bansal's whole body impairment rating and a conversion table in the AMA Guides to calculate the scheduled member functional impairment rating they believe is appropriate. (Def. Brief at p. 11) Despite the differences, the Kern opinion controls.

Here, as in Kern, the clear effect of the defendants' choice not to obtain a permanent impairment rating regarding Parsons's injury is a zero percent impairment rating. Had Parsons not obtained an IME in this case, there would be no expert opinion in the record on permanent disability. The fact that the defendants chose not to get an impairment rating and now argue the agency should use the impairment rating in Dr. Bansal's IME report as the basis for a finding of permanent disability to the right foot, while also arguing Parsons is not entitled to reimbursement for Dr. Bansal's IME, shows the practical impact of the agency's prior interpretation of section 85.39, which the Kern court found contrary to the legislative intent underpinning the statute and the caselaw construing it. See id. at *4; see also Lozano Campuzano, 940 N.W.2d at 435. Consequently, under Kern, the defendants must reimburse Parsons for the full and reasonable cost of Dr. Bansal's IME under section 85.39.

3. Taxation of 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)).

Under the administrative rules governing contested case proceedings before the agency, hearing costs shall include:

- Attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions;
- Transcription costs when appropriate;
- Costs of service of the original notice and subpoenas;

- Witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72;
- 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;
- Reasonable costs of obtaining no more than two doctors' or practitioners' reports;
- Filing fees when appropriate, including convenience fees incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES); and
- Costs of persons reviewing health service disputes.

876 IAC 4.33.

Parsons has prevailed on the disputed issues of permanent disability and reimbursement of IME expenses. Consequently, it is appropriate to tax costs against the defendants. The defendants must pay the one hundred and 00/100 dollars ($100.00) filing fee and thirteen and 40/100 dollars ($13.40) in service costs incurred by Parsons while litigating this case. (Jt. Ex. 15, p. 81) However, the rule does not expressly identify medical records as a taxable cost and it is unclear how, if at all, the costs relating to Dr. Jacoby's records might fit into another category under the rule. Consequently, costs relating to Dr. Jacoby's records are not taxed.

ORDER

THEREFORE, IT IS ORDERED:

1) The defendants shall pay to the claimant two hundred and fifty (250) weeks of permanent partial disability benefits at the rate of two hundred twenty-nine and 75/100 ($229.75) per week from the commencement date of April 3, 2019.

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 shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).

5) The defendants shall pay to Parsons two thousand nine hundred sixty-four and 00/100 dollars ($2,964.00) for the cost of Dr. Bansal's IME.

6) The defendants shall pay to the claimant the following amounts for the following costs:

   a. One hundred dollars and 00/100 ($100.00) for the filing fee; and

   b. Thirteen and 40/100 dollars ($13.40) for the cost of service by certified mail.

Signed and filed this 4th day of January, 2022.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Janece Valentine (via WCES)

Dennis Riekenberg (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.