BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ADAM SHIELDS, Claimant, vs. CLOVERLEAF, Employer, and INSURANCE CO. OF THE STATE OF PENNSYLVANIA, Insurance Carrier, Defendants.	:	File No. 5059699 ARBITRATION DECISION Head Note Nos.: 1108, 1400, 1402.40, 1802, 18003, 1803.1, 1807, 2206, 3000, 3800

STATEMENT OF THE CASE

This is a petition in arbitration. The contested case was initiated when claimant, Adam Shields, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on September 25, 2017. Claimant alleged he sustained a work-related injury on January 26, 2017. Claimant alleged the work injury affected his left lower extremity, nerve damage, and his body as a whole. (Original notice and petition)

For purposes of workers' compensation, Cloverleaf Cold Storage is insured by Insurance Co. of the State of PA. Ms. Mary M. Herman also testified. She is the human resource manager at Cloverleaf. Defendants filed their answer on October 16, 2017. Defendants accepted the claim for left foot injury. A first report of injury was filed on January 30, 2017.

The hearing administrator scheduled the case for hearing on September 21, 2018. The hearing took place at Iowa Workforce Development in Sioux City, Iowa. The undersigned appointed Ms. Sarah J. Dittmer as the certified shorthand reporter. She is the official custodian of the records and notes. The original transcript was filed on October 3, 2018.

Claimant testified at hearing. The parties offered Joint Exhibits 1 through 9. Claimant offered Exhibits 1 through 9. Defendants offered Exhibits A through M. The exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on November 21, 2018. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the injury;

2. Claimant sustained an injury on January 26, 2017, which arose out of and in the course of her employment;

3. The parties agree the injury resulted in both temporary and/or permanent disability;

4. Defendants have waived any affirmative defenses;

5. Medical benefits are no longer in dispute;

6. Prior to the hearing date, defendants have paid weekly indemnity benefits in the amount of $487.09 per week since January 27, 2017 through the date of the hearing and ongoing. However, the nature of the indemnity benefits is in dispute;

7. Claimant has paid certain costs and defendants do not dispute those costs have been paid.

ISSUES

The issues presented are:

1. Claimant is seeking healing period benefits for the period from January 28, 2017 through May 14, 2017 and November 21, 2017 through April 30, 2018. Defendants admit claimant was off work during this period of time, but defendants assert claimant refused available light duty work;

2. The parties dispute whether the permanent work injury was a scheduled member injury or an injury to the body as a whole;

3. The commencement date for any permanency benefits is in dispute. Claimant alleges the date is May 1, 2018; defendants maintain the date is May 12, 2017 with intermittent temporary benefits paid from November 28, 2017 to January 19, 2018; and

4. Claimant is requesting the payment of an independent medical evaluation (IME) pursuant to Iowa code section 85.39.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and Ms. Herman at hearing, after judging the credibility of the two people who testified, and after reading the evidence, the transcript, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 38 years old. He is married but lives with his mother in Aurelia, Iowa. Aurelia has a population of approximately 1,000 people and is located in Cherokee County. At the time of the hearing, claimant was unable to hold a valid driver's license. Claimant has not lived with his wife for some time. Claimant has three children. On the date of the work injury, all three of the children were minors but they did not reside with claimant.

Claimant attended high school for one year in Arizona. In 2001 he earned his general equivalency diploma (GED). Claimant also took some classes through a community college but he did not obtain a degree. In 2004, claimant did become a certified upholsterer. Claimant obtained a certification as a forklift driver in 2016 when he was employed at Cloverleaf. (Claimant's Exhibit 5, page 10)

Claimant detailed his employment history in his answer to Interrogatory No. 9. The history is listed in Claimant's Exhibit 5, page 11. Claimant applied for a position with Cloverleaf Cold Storage on August 17, 2016. (Defendants' Ex. A, p. 1) Claimant applied for the position of warehouse worker.

Defendants submitted Exhibit C, pages 1 and 2. The pages contain the job description for the position of warehouse equipment operator. (Cl. Ex. 1, pp. 1-2) The job summary provided:

> While Operating Powered Industrial Vehicles, this person will be responsible for performing warehouse duties as assigned in an accurate and timely manner.

(Cl. Ex. 1, p. 1)

The managers at Cloverleaf Cold Storage required the warehouse equipment operators to possess the following skills:

Required Skills:

Regularly stand and walk for 8 or more hours in a day.

Effectively handle lifting, pushing, pulling up to 60 pounds frequently

> Frequently required to bend, twist, stoop, grip, climb, or balance, reach with hands and arms.
>
> Use strong math skills to count and multiply accurately.
>
> Use non-motorized and powered equipment.

(Cl. Ex. 1, p. 1)

> Additionally, the following physical requirements were imposed:
>
> **Physical Requirements:** While performing the essential functions of this job, the associate will work frequent prolonged work schedules with little advance notice with continuous exposure to extreme cold and noise.

(Cl. Ex. 1, p.1)

Claimant was hired in August of 2016 to work in "The Blast," a 40 below zero freezer. (Tr., p. 14) Cloverleaf Cold Storage is engaged in the business of storing products that must be kept in extremely cold temperatures. (Tr., p. 14) Members of management hired claimant to operate a "stand-up forklift." Claimant was so competent, he was hired to train another individual how to drive a "stand-up forklift." On January 26, 2017, claimant and his trainee collided. The accident was horrific.

In his own words, claimant testified how the accident occurred:

> Long story short, they have laser eyes that when you approach the door, it opens itself. I went to break at 6:15, and I came back - - or 6:00. I came back at 6:15. And I went back into the freezer where I was training this guy.
>
> And it's like we were on the same spot just on opposite sides of the door. So as soon as that laser eye caught and the doors opened, there he was. He was coming this way; I was coming this way.
>
> And when - - I mean, the only thing to do is just take your foot off the pedal. It engages the emergency brake. And I knew I was going to hit him, so I just turned to brace myself. And my foot flew out, and it got caught between the two lifts.

(Tr., p. 17)

Claimant continued and described the brake system on the forklift truck.

> Q. (By Mr. Sahag) Explain the brake situation again. You said you took your foot off the brake. How does that work?

A. There's – Well, on the - - this particular lift, on the crown, there's two pedals. And one is more of a weight-bearing thing. And that's the one on your right leg.

And then there's actually a pedal that's - - it engages a brake. It helps - - You can't move the forklift without putting your foot on that pedal.

And even in the trainings, they teach you if you're going to run into the wall or run into somebody else, take your foot off the brake - - or take your foot off the pedal. So that's what I did - -

Q. Taking your foot off the pedal engages the brake?

A. - - Engages the brake. The only problem is in cold storage, there's a lot of condensation on the floor. Temperature changes, you know, minus 40 to plus 30. There's a lot of condensation, a lot of built-up ice on the doors and - - you know.

So when the brake engages, you're still going to slide a little ways, you know. You know, not like forever, but you're going to slide.

Q. And when you took your foot off the brake, I take it your foot swung outside of the forklift?

A. Yes, because I turned - - I turned to brace myself. My hand was on the control stick, and I turned because - - I was going full speed. I think over there they go seven and a half miles an hour.

And when I turned to brace myself, my leg just, all in one motion, it flew out. And he was right there.

Q. And it got - - your leg got caught in between the two forklifts?

A. Just my foot from the ankle down.

Q. And was crushed?

A. Crushed completely.

(Tr., pp. 18-20)

Initially, claimant was taken to Mercy Medical Center in Sioux City, Iowa. The hospital admitted claimant under the care of Brian Johnson, M.D. Imaging studies were ordered of the left foot. The results showed multiple metatarsal fractures, and fragments, and dislocation of the Lisfranc variety. An initial surgical procedure was performed to drain and incise the wound and an external fixator was put into place. (Jt. Ex. 3, p. 36)

On January 28, 2017, David Rettedal, DPM, examined claimant. The doctor of podiatric medicine recommended claimant be transported to the operating room for an open reduction of Lisfranc fracture-dislocation with application of external fixation and pinning, and a repeat debridement of the open wound with possible placement of a vacuum assisted closure, a possible closure and possible fasciotomies. Dr. Rettedal planned the surgical procedures as part of a staged procedure. The podiatrist determined the final fixation would take place in several weeks, after the soft tissue had time to calm. (Cl. Ex. 6, p. 15)

As planned, claimant underwent a fasciotomy, irrigation and debridement of the left foot with application of the vacuum assisted closure. Dr. Rettedal also applied an application of an external fixation device with open reduction and internal fixation of the dislocated third digit. (Cl. Ex. 6, p. 15)

On January 31, 2017, claimant was transferred to Mercy Hospital in Council Bluffs, Iowa. Claimant underwent repeat irrigation and debridement of the medial fasciotomy wound with a reapplication of the wound vacuum assisted closure. There was also a partial amputation of the left 3rd toe by Dr. Rettedal. (Cl. Ex. 6, p. 15)

John D. Park examined claimant on the following day. The physician recommended continued wound care and observation. (Cl. Ex. 6, p. 15)

On February 3, 2017, Dr. Rettedal performed a repeat debridement of the left foot medial fasciotomy wound with a surgical closure. (There was a partial amputation of the left 3rd toe.) Claimant was also transferred from Council Bluffs, Iowa to Mercy Medical Center in Sioux City, Iowa. Claimant wanted to be closer to his home in Aurelia. (Cl. Ex. 6, p. 15)

Also on February 3, 2017, Michael Espiritu, M.D., examined claimant. Claimant reported his foot swelling had improved and he was having better flow to his toes, even though some of them appeared dark. Claimant completed his antibiotic regimen before he was transferred to Sioux City. Claimant reported numbness in his toes. However, he was able to wiggle them. Claimant was informed to remain non-weight bearing on the left lower extremity. (Cl. Ex. 6, p. 15) Claimant was placed on Heparin. (Cl. Ex. 6, p. 15) He continued to take oral medications for pain. (Cl. Ex. 6, p. 15)

Ashar Luqman, M.D., a board-certified physician in internal medicine and who specialized in nephrology, examined claimant on February 9, 2017. Dr. Luqman was involved in assisting with recommendations for acute inpatient rehabilitation. It was determined claimant would continue with pain management while he was in the hospital but he did not qualify for acute rehabilitation. (Cl. Ex. 6, p. 15)

On February 13, 2017, claimant underwent x-rays of the left foot. The films showed no significant change in the nondisplaced fracture in the distal shaft of the fourth metatarsal. External fixators were also overlying the first and second metatarsals and fixing the cuneiform bones with re-demonstration of the fracture in the middle cuneiform with near anatomic alignment. (Cl. Ex. 6, p. 15)

Additionally, on February 13, 2017, Daniel Kensinger, M.D., visited claimant in the hospital. Claimant reported the great degree of pain he had experienced during the prior night. Claimant reported "a burning nerve-type pain." (Cl. Ex. 6, p. 16) The physician advised claimant to keep his foot elevated to heart level. Dr. Kensinger reviewed pictures of the soft tissues with Dr. Rettedal. The podiatrist did not believe the plantar skin would be viable for any type of midfoot salvage procedure. A higher level amputation was discussed. (Cl. Ex. 6, p. 16) Pain control was also a point of discussion. (Cl. Ex. 6, p. 16)

On February 20, 2017, claimant was transferred back to Mercy Hospital in Council Bluffs, Iowa. On the following day, Dr. Rettedal performed a Lisfranc amputation of the left foot, naviculocuneiform fusion, removal of external fixation, with wound vacuum closure. Dr. Rettedal applied a posterior splint. (Cl. Ex. 6, p. 16) An x-ray of the left foot was also taken on the same day. There were expected postoperative changes. (Cl. Ex. 6, p. 16)

On February 23, 2017, Dr. Rettedal performed a repeat debridement of the left foot wounds with application of the wound vacuum assisted closure. There was percutaneous Achilles tendon lengthening on the left as well. (Cl. Ex. 6, p. 16) Dr. Rettedal released claimant from the hospital in Council Bluffs. Claimant had instructions to be non-weight bearing on the left foot, to use a scooter, and to wear a CAM boot on the left foot. (Cl. Ex. 6, p. 16)

Paul Johnson, M.D., examined claimant at the Outpatient Wound Clinic on February 27, 2017. (Cl. Ex. 6, p. 16) Dr. Johnson provided wound care and VAC changes. The physician also provided several prescriptions for pain. Claimant was advised to follow up at the clinic for wound care and VAC changes. (Cl. Ex. 6, p. 16)

Claimant returned to the wound clinic on March 3, 2017. (Cl. Ex. 6, pp. 16-17) X-rays of the left foot demonstrated expected postsurgical changes. (Cl. Ex. 6, p. 17)

Claimant had a left foot ulcer. Dr. Johnson debrided selective tissue of the ulcer on the left medial foot amputation. There was a surgical wound that was 3 x 1.5 x 0.2. The tissue was a partial build-up of devitalized tissue as well as 2 areas of retained black foam that was incorporated into the nonviable tissue of the left foot. (Cl. Ex. 6, p. 17) Dr. Johnson also contacted physical and occupational therapy about acquiring crutches and a shower chair. (Cl. Ex. 6, p. 17)

Dr. Johnson examined claimant again on March 14, 2017 for wound assessment and wound VAC change. Dr. Johnson performed a 100 percent selective debridement of the ulcer sites of the left foot on the medial aspect (2.2 x. 1.4 x 0.5). There were ulcer sites on the lateral aspect (0.9 x 1.5 x 0.5). (Cl. Ex. 6, p. 17)

On March 17, 2017, Dr. Kensinger examined claimant. (Cl. Ex. 6, p. 17) Claimant reported he had been tolerating the VAC changes and debridements. X-rays of the left foot showed no new abnormalities. Dr. Kensinger told claimant to remain non-weight-bearing with the left lower extremity. (Cl. Ex. 6, p. 17)

Dr. Johnson saw claimant on March 20, 2017. Once again the physician debrided the ulcers to hasten healing. (Cl. Ex. 6, p. 17)

Dr. Kensinger examined claimant on March 24, 2017. Claimant was approved for Grafix. A wound graft was to be utilized for hardware exposure. Claimant described some phantom pain about the distal foot, especially where the great toe used to be located. (Cl. Ex. 6, p. 17) Claimant had kept his weight off the left leg. He was advised to continue with VAC changes 3 times per week. (Cl. Ex. 6, p. 17) Dr. Johnson performed preparation debridement followed by an application of Grafix. (Cl. Ex. 6, p. 18)

Claimant returned to the wound center for follow-up care of his left foot ulcers on April 3, 2017. (Cl. Ex. 6, p. 18) Claimant had his second application of Grafix. (Cl. Ex. 6, p. 18) He was using a scooter for his left leg. (Cl. Ex. 6, p. 18)

Dr. Johnson examined claimant on April 10, 2017. Claimant had a third application of Grafix. Then the graft was covered with white foam, Kerlix and Coban dressing. Claimant used a self-propelled scooter for mobility. (Cl. Ex. 6, p. 18)

On April 25, 2017, Dr. Johnson examined claimant. The wound had responded well to Grafix therapy. The dressing was to be changed once a week. Claimant was advised to continue to use his scooter. (Cl. Ex. 6, p. 18)

Dr. Johnson tended to claimant's left foot ulcer on May 9, 2017. There were no new problems or concerns. Dr. Johnson advised claimant to change his dressings 3 times per week. Claimant was advised to follow up at CNOS for a consultation with a prosthetist at CNOS. Dr. Johnson released claimant from active wound care services. (Cl. Ex. 6, p. 18)

On May 12, 2017, claimant saw Dr. Rettedal at the Dakota Dunes Clinic. (Jt. Ex. 1, p. 1) The podiatrist formulated the following treatment plan for claimant:

> I saw the patient in the office today and answered his questions to the best of my ability. He is overall doing very well. He has completely healed all of his ulcerations. He has weaned himself off all pain medication. He has been weightbearing to the left foot with no issues. He is waiting on his prosthetic device. He has excellent muscle strength at this time with muscle strength in all directions. At this point, I am okay to release him to work full duty. He should be allowed to wear either the CAM boot or the custom prosthetic device to his left foot while he is working. He can weightbear to tolerance and do all activities to tolerance. I have no restrictions for him from a weightbearing standpoint. I did discuss with him that in the future if he has any tendon imbalance problems such as equinus deformities or varus deformities that either a brace or some type of tendon transfer or a fusion would be options. As of now, he is doing very well with muscle strength and no obvious deformities. This is quite remarkable given his degree of injury. I am very

> happy for him. I am going to release him from my care at this point and see him on an as-needed basis. He can call with any problems or concerns.

(Jt. Ex. 1, p. 1)

Dr. Rettedal deemed claimant to be at maximum medical improvement (MMI) on May 12, 2017. Claimant was returned to full duty work without any restrictions. (Jt. Ex. 1, p. 4) The doctor required claimant to wear closed-toed shoes. (Tr., p. 26) Claimant testified he returned to work on May 19, 2017 at $17.86 per hour plus a 50 cent per hour shift differential. (Tr., p. 26) This was more money than claimant had earned prior to his work injury. (Tr., p. 26)

On May 26, 2017, Dr. Rettedal requested Douglas Martin, M.D., to perform an assessment for a permanent impairment rating of the left foot. (Jt. Ex. 1, p. 6) Dr. Martin examined claimant on July 3, 2017. The evaluating physician also reviewed various x-rays and medical records. During the physical examination, Dr. Martin noted:

> **PHYSICAL EXAMINATION** :
>
> The gentleman was pleasant and cooperative during the course of the history taking and physical examination. Examination of his left foot reveals that there is a tarsometatarsal joint amputation that has occurred. The scars are well healed. He does complain of tenderness upon palpation over the medial calcaneal tubercle, as well as over the plantar aspect of the foot.
>
> He has remarkably good range of motion at the ankle, with regards to dorsiflexion, plantar flexion, inversion, and eversion. I do not see any appreciable differences when comparing this to the right side. He also has excellent muscle tone and there is no evidence of any atrophy of the calf, when compared to the right side.
>
> Neurosensory examination, including light touch and two-point discrimination testing are retained. Reflex testing of the patellae and Achilles are 2+ and symmetric. I do not see any range of motion limitations of the knee joint.
>
> There is no clubbing, cyanosis or edema appreciated. He has excellent skin distribution and there are no color differences. There are no temperature differences, when compared to the opposite side. The hair distribution is in a normal pattern.
>
> His gait pattern was assessed and he does have an antalgic gait pattern, referring to only putting pressure on his left foot over the calcanea[l] tip.
>
> **ASSESSMENT**:

> . . . History of a crush injury to the left foot initially creating a Lisfranc deformity, multiple fractures and dislocations
>
> . . . Status post multiple surgical procedures for #1 above; eventually leading to a tarsometatarsal joint amputation
>
> . . . Plantar fasciitis-like syndrome

(Jt. Ex. 3, pp. 37-38)

Dr. Martin suggested claimant see someone at Hanger Prosthetic in Sioux City. The evaluating physician also suggested Lyrica be discontinued and claimant should take an over-the-counter anti-inflammatory. (Jt. Ex. 3, p. 38)

With respect to a permanent impairment rating, Dr. Martin opined:

> Impairment rating, in this case, is base [*sic*] upon the principles of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, as well as the principles and practices and utilization of these Guides, as taught by the Internal Academy of Independent Medical Evaluators (previously known as the American Academy of Disability Evaluating Physicians) and as tested by that organization, as well as that by the American Board of Independent Medical Examiners.
>
> This gentlemen's impairment rating would be based upon the Lower Extremity Chapter of the Fifth Edition, with specific attention to Section 17.2.i that begins on page 545.
>
> With reference to Table 17-32 on said page, a mid foot amputation is rated as a 64 percent impairment of the foot, a 45 percent impairment of the lower extremity, or an 18 percent impairment of the whole person.
>
> I believe the gentleman has reached a degree of maximum medical improvement.

(Jt. Ex. 3, p. 39)

Dr. Martin opined claimant could return to work at Cloverleaf. Moreover, claimant could perform the duties of a forklift operator. (Jt. Ex. 3, p. 40) Claimant worked in the warehouse from May 19, 2017 to November of 2017. He testified working in the cold environment adversely impacted his ability to walk with his left foot and leg. Claimant described his symptoms of pain at work.

> Q. (By Mr. Sahag) Did you have any symptoms of pain during that process?
>
> A. Oh, of course.

Q. Why don't you describe those.

A. Well, I learned what the difference is between nerve pain and actual physical pain. I had a little bit of pain in the ankles. Every time I walked, it was just - - I just had to learn how to walk all over again, basically.

Trying to walk with no toes is - - it's different, but I guess you kind of make due [*sic*] with what you've got.

All I did was stand on a lift all night. You know, they had - - they had guys - - they hired guys for - - to be dock workers. And then they hired guys to be lift drivers.

And I was designated as a lift driver. And I was good at what I did, so everybody came to me you know.

So I'd stay busy all night long. But the problem was, once you get in that freezer and you get going and stuff gets going real fast, you don't realize how long you're in there. You miss your break; you miss your lunch.

And then the next thing you know, it's frozen, and I'm sitting down for an hour and a half because I can't stand.

Q. How does not having any toes affect your balance, in your opinion?

A. Well, for example, yesterday I was leaning over trying to put some stickers on a box, and my knee wasn't quite touching the ground. And just the slight movement forward, I fell face-first into the boxes.

Q. You lost your balance on the day of the injury. Is that a concern of yours or was that a concern of yours as you were operating that stand-up forklift?

A. No. I mean, I was always concerned when - - you know, when I step off the lift how it's going to be. You know, operating a lift was - - I had no problems with it.

Like I said, you just - - you just stand there. And, actually, the weird thing is, my foot was more comfortable being on the lift than it is walking around.

It hurts to walk, but to stand - - I don't know. The lift has cushions and - - you know, and rubber plates and all that stuff. So - - But once you - - once I step off the lift, it's a whole other story.

Q. And I'm assuming that if you had to move boxes on a pallet after the injury, that would be more difficult without - -

A. It is.

Q. - - half of your foot?

A. It is if you have to pick them on [*sic*] up off the floor. You know, if you're just moving them from here to here, that's one thing. But picking them up off the ground, that's totally different.

Even then, moving them from here to there, it's 70, 80 pounds. That's heavy for anybody, especially when, you know, the toes - - no toes - - Yeah. You don't realize how bad you need your toes.

(Tr., pp. 28-30)

On October 18, 2017, claimant visited the Siouxland Pain Clinic. (Jt. Ex. 2, p. 22) Mary A, Gengler, CNP, attended to claimant. Claimant reported burning, sharp, and shooting pain. He had tenderness over the amputation incision and along the bottom of his foot. (Jt. Ex. 2, p. 22) Nurse Practitioner Gengler renewed claimant's prescription for Lyrica and counseled claimant to take an over-the-counter anti-inflammatory medications or Tylenol. (Jt. Ex. 2, p. 22) Claimant reported bilateral hip pain. (Jt. Ex. 2, p. 23) Both trochanteric bursae showed tenderness on palpation. (Jt. Ex. 2, p. 24) There was pain with hip motion. (Jt. Ex. 2, p. 24) The nurse diagnosed claimant with bilateral trochanteric bursitis. (Jt. Ex. 2, p. 24) Claimant also reported depression, anxiety, and nightmares. (Jt. Ex. 2, p. 23) The nurse emphasized the importance of proper nutrition, rest, daily stretching, and regular exercise. (Jt. Ex. 2, p. 25)

There was a follow-up visit on November 15, 2017. Claimant complained of continued bilateral greater trochanteric bursitis. (Jt. Ex. 2, p. 26) There was tenderness on palpation of the trochanteric bursa. (Jt. Ex. 2, p. 27) The nurse practitioner diagnosed claimant with chronic pain. Claimant was given an injection for pain. (Jt. Ex. 2, p. 28)

On November 21, 2017, claimant sprained his left ankle while he was working in the warehouse. (Tr., p. 31) He testified there was ice on the floor of the warehouse and claimant slipped and injured his left foot while he was trying to move a heavy box. (Tr., p. 31)

Claimant returned to Dr. Rettedal on November 28, 2017. Claimant provided the following history to his doctor:

SUBJECTIVE: The patient returns to the office in regards to his left lower extremity. He has an extensive history with his left foot from a crush injury at work. This ultimately resulted in a left Lisfranc amputation with midfoot fusions and tendo-Achilles lengthening. He has been working full duty at work. He states that on November 21, he slipped and fell on the ice at work. He felt immediate pain to the left ankle. He points to the lateral left ankle when describing his pain. The pain has been significant enough that he has not been able to work. He also states that he kicked the left

> foot into something, which really has been hurting the distal aspect of his amputation stump. He states that rest makes the left foot and ankle pain better. He states that walking makes it worse. He is wondering about making sure that everything is fine. He is wondering about making sure that everything is fine. He is also wondering about his treatment options.

(Jt. Ex. 1, p. 9)

Dr. Rettedal diagnosed claimant with a left lateral ankle sprain. (Jt. Ex. 1, p. 9) The podiatrist prescribed a CAM boot for the left lower extremity. Claimant was removed from work. (Jt. Ex. 1, p. 9)

Dr. Rettedal rechecked the left foot on January 17, 2018. Claimant reported debilitating pain. The left ankle sprain had improved. (Jt. Ex. 1, p. 11) Claimant discussed a below-the-knee amputation. (Jt. Ex. 1, p. 11) Dr. Rettedal referred claimant to Dr. Kensinger. (Jt. Ex. 1, pp. 11, 13) Claimant was removed from work.

Claimant visited Dr. Kensinger on February 8, 2018. (Jt. Ex. 1, p. 18) The doctor placed claimant on light duty work. Dr. Kensinger did not recommend a below-the-knee amputation. The physician also ordered a functional capacity evaluation (FCE). (Jt. Ex. 1, p. 16) The physician opined claimant should remain on light duty but in a seated position.

On February 12, 2018, claimant underwent bursa injections. They were administered by Nurse Practitioner Gengler. (Cl. Ex. 6, p. 19)

On the very same date, claimant presented to the emergency room at Floyd Valley HealthCare in Le Mars, Iowa. (Jt. Ex. 5, p.58) Claimant complained of anxiety. (Jt. Ex. 5, p. 58) He was given 50 mg of Vistaril through an injection. (Jt. Ex. 5, p. 58) Amer G. Qazi, M.D., advised claimant to obtain a personal care physician. (Jt. Ex. 5, pp. 58-59)

On February 26, 2018, claimant had an appointment with Michael R. Inman, LMSW. Mr. Inman diagnosed claimant with: “Panic disorder without agoraphobia.” (Jt. Ex. 6. p. 66) Claimant voiced concerns about experiencing panic attacks at work. (Jt. Ex. 6, p. 66) Claimant explained he was overwhelmed with worry because of his prior work injuries and his pending return to work. (Jt. Ex. 6, p. 67) Claimant reported he was not suicidal. (Jt. Ex. 6, p. 68) Claimant admitted he smoked and used alcohol. He denied using cocaine, crack, heroin or opioids. (Jt. Ex. 6, p. 69)

Dr. Kensinger scheduled a functional capacity evaluation for claimant. Initially, the exam was scheduled for March 14, 2018 at Excel Physical Therapy. Claimant arrived 1 hour late. Then he had to leave the exam before it was completed due to a family emergency. A follow up appointment was scheduled for March 16, 2018. Claimant canceled the appointment. Claimant rescheduled the appointment for Monday, March 26, 2018. Claimant did not appear for the FCE. Neal Wachholtz, PT, DPT, informed Dr. Kensinger, the physical therapy clinic would no longer schedule any more appointments for claimant. (Jt. Ex. 8, p. 77)

On March 20, 2018, claimant presented to the Siouxland Pain Clinic. Nicholas E. Fernando PA, treated claimant. (Jt. Ex. 2, p. 29) Claimant was late for his appointment. He reported breaking up with his girlfriend. He remained married but separated from his spouse. Claimant stated he suffered from ADD and was hyperactive. Mr. Fernando reviewed a urine drug screen claimant had taken at the clinic. The test was positive for methamphetamines. (Jt. Ex. 2, p. 29) Mr. Fernando informed claimant there would be no prescriptions for any controlled substances. (Jt. Ex. 2, p. 30) Mobic was prescribed. (Jt. Ex. 2, p. 30) The physician's assistant diagnosed claimant with:

> Closed fracture dislocation of tarsometatarsal joint [S92.302D – Fracture of unspecified metatarsal bone(s), left foot, subsequent encounter for fracture with routine healing]
>
> Phantom pain [G54.6 –Phantom limb syndrome with pain]
>
> Chronic pain syndrome [G89.4 – Chronic pain syndrome]
>
> Amputation of limb [Z89.9 – Acquired absence of limb, unspecified]
>
> Lisfrank [*sic*] Amputation, midfoot fusion.

(Jt. Ex. 2, p. 31)

Mr. Fernando recommended claimant follow up with a mental health specialist addressing EDMR, cognitive behavioral therapy, and claimant's addiction issues. (Jt. Ex. 2, p. 31)

Dr. Kensinger referred claimant to Physical Therapy Specialists, P.C. for a functional capacity evaluation. The test was performed on April 23, 2018. Timothy M. Saulsbury, PT, DPT, conducted the FCE. The test was determined to be valid. Claimant gave good effort during the FCE. According to Mr. Saulsbury the results demonstrated:

> **FCE RESULTS**
>
> The results indicate that Mr. Shields is able to work at the HEAVY Physical Demand Level for an 8 hour day according to the Dictionary of Occupational Titles, U.S. Department of Labor, 1991. His specific acceptable Leg Lift capability was 60.0 lb and Back Lift capability was 40.0 lb. The detailed results are on the enclosed FCE form. Mr. Shields demonstrated very good strength, balance, and functional mobility during this FCE. His limp increased dramatically when he was aware that he was being observed. Indicating a conscious willingness to exaggerate his symptoms. On a positive note, his effort with lifting was very good and sincere, indicating a willingness to function without disability.

(Jt. Ex. 4, p. 41)

Dr. Kensinger examined claimant on May 1, 2018. The amputation site had completely healed. Dr. Kensinger adopted the restrictions recommended by the physical therapist after the functional capacity evaluation had been administered. (Jt. Ex. 1 pp. 17, 19) Claimant reported some issues with pain, primarily hypersensitivity about the amputation site. (Jt. Ex. 1, p. 17) Claimant was displeased with the fillers he was provided for his shoes and boots. (Jt. Ex. 1, p. 17) Dr. Kensinger opined claimant had reached MMI with respect to his re-injury on November 21, 2017. (Jt. Ex. 1, p. 17)

On June 12, 2018, Dr. Rettedal examined claimant because of intermittent pain on the bottom of claimant's left foot. (Jt. Ex. 1, p. 20) Dr. Kensinger ordered a new filler for claimant's left shoe. Dr. Rettedal opined:

> His [claimant's] work restrictions are per his FCE that he had done. His foot is plantigrade and is functional currently. I agree with Dr. Kensinger's evaluation of this. He was seeing the pain clinic, but is not seeing them at this time. I discussed with him that he should establish a primary care physician. From my standpoint, his foot is stable and functional and is in plantigrade position. I believe he is at MMI. I will make him full duty per his FCE. I can see him back as needed. He can call with any questions or concerns.

(Jt. Ex. 1, p. 20)

Pursuant to Iowa Code section 85.39, claimant exercised his right to an independent medical examination with a medical provider of his own choice. Robin L. Sassman, M.D., MPH, examined claimant on June 27, 2018. Later, Dr. Sassman issued a report on August 15, 2018. The report detailed the findings and opinions of Dr. Sassman. Dr. Sassman conducted a physical examination of claimant. She noted in her report:

> He exhibited an obvious limp. He was tender to palpation over the bilateral hips. He was tender to palpation over the bilateral SI joints and the lumbar spinous processes.

(Cl. Ex. 6, p. 21)

Dr. Sassman also checked claimant's range of motion of the back. (Cl. Ex. 6, p. 21) The independent medical examiner examined claimant's left lower extremity for any sensory deficits. Dr. Sassman noted:

> Sensory examination showed decreased sensation in the left lower extremity from the mid-portion of the lower limb to the foot. No dermatomal loss of sensation was noted. Figure-of-Four testing caused pain in the back.
>
> Examination of the left foot revealed the Lisfranc amputation through the tarsometatarsal joint. He was tender to palpation over the scars. The amputation site appeared completely healed.

(Cl. Ex. 6, p. 22)

Dr. Sassman also checked the range of motion of the right and left knee; the right and left hips; and the right and left ankles. (Cl. Ex. 6, p. 22) The x-ray of the left knee showed:

> An x-ray of the left knee was obtained to assess for degenerative changes. The cartilage interval of the medial knee was 3 mm. The other cartilage intervals were within normal limits.
>
> An x-ray of the left hip was also obtained to assess for degenerative changes. The cartilage interval superiorly and inferiorly was 3 mm.

(Cl. Ex. 6, p. 22)

Dr. Sassman diagnosed claimant with the following conditions:

> 1. Left foot crush injury with subsequent Lisfranc amputation of the left foot and naviculocuneiform fusion on February 21, 2017, and multiple subsequent debridement procedures.
>
> 2. Left hip bursitis secondary to a gait change due to #1.
>
> 3. Low back pain and bilateral SI joint point secondary to a gait change due to #1.
>
> 4. Left knee pain secondary to gait change due to #1.
>
> 5. Right hip pain secondary to a gait change due to #1.
>
> 6. Left ankle sprain, resolved.

(Cl. Ex. 6, p.22)

Dr. Sassman related all of her diagnoses directly and causally to the original work injury on January 26, 2017 and the subsequent Lisfranc amputation that occurred on February 21, 2017. (Cl. Ex. 1, pp. 22-23) Dr. Sassman based her causation opinions on the following:

> It is my opinion that the above diagnoses are directly and causally related to the injury that occurred on January 26, 2017, when Mr. Shields' foot was crushed by a forklift. This injury ultimately resulted in the need for the Lisfranc amputation that took place on February 21, 2017. Because of the change in gait as a result of the injury, he now experiences bilateral hip pain and low back pain as well as bilateral SI joint pain. He also sustained a left ankle sprain when he returned to work due to the left foot slipping. This has since resolved. Because Mr. Shields denies having any

> symptoms in these areas prior to the injury, and the mechanism is consistent with the injury, I am led to this conclusion.

(Cl. Ex. 6, p. 23)

Dr. Sassman opined claimant was not at MMI. The independent medical examiner believed claimant would benefit from additional pain management by a specialist. Dr. Sassman also recommended magnetic resonance imaging (MRI) of the lumbar spine. Finally, Dr. Sassman recommended counseling for claimant. Claimant indicated he was amenable to participating in counseling. (Cl. Ex. 6, p. 23)

Dr. Sassman imposed permanent work restrictions. They were:

> Mr. Shields should limit standing, walking and sitting to an occasional basis and will need to change positions frequently due to his symptoms. He should not walk on uneven surfaces. He should not use ladders. He should not crawl.

(Cl. Ex. 6, p. 24)

Even though Dr. Sassman opined claimant was not at MMI, she did provide a permanent impairment rating for claimant. The rating and the method for calculating the rating are duplicated below:

> **Impairment Rating**
>
> Based upon the reasonably demonstrable objective findings, and using the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition,* I would assign impairment as follows:
>
> For the amputation, based on Table 17-32 on page 545, he can be assigned 45% lower extremity impairment.
>
> For the left hip, no ratable impairment exists for range of motion. For degenerative changes, based on Table 17-31 on page 544, he can be assigned 7% lower extremity impairment.
>
> For the left knee, no ratable impairment exists for range of motion. For degenerative changes, based on Table 17-31 on page 544, he can be assigned 7% lower extremity impairment.
>
> Overall for the left lower extremity, 45% lower extremity impairment (for the amputation) is combined with 7% lower extremity impairment (for the left hip) and 7% lower extremity impairment (for the left knee) for a total of 53% lower extremity impairment. Using Table 17-3 on page 527, this is converted to 21% whole person impairment.

> For the low back, using Section 15.2 on page 379, the most appropriate method for assessment of the lumbar spine is the DRE Method. Turning to Table 15-3, on page 384, he will be placed into DRE Lumbar Category II with 5% impairment of the whole person.
>
> Overall, using the Combined Values Chart on page 604, 21% whole person impairment (for the left lower extremity) is combined with 5% whole person impairment (for the low back) for a total of 25% whole person impairment relative to the injury that occurred on January 26, 2017.

(Cl. Ex. 6, p. 24)

CONCLUSIONS OF LAW AND RATIONALE

The first issue for determination is the matter of healing period benefits. Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

HEALING PERIOD BENEFITS

In 2017 the Iowa Legislature added provisions to Iowa Code section 85.33 with respect to suitable work offered by the employer to the injured employee. Iowa Code section 85.33(3)(a) provides:

> 3. a. If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. Work offered at the employer's principal place of business or established place of operation where the employee has previously worked is presumed to be geographically suitable for an employee whose duties involve travel away from the employer's principal place of business or established place of operation more than fifty percent of the time. If suitable work is not offered by the employer for whom the employee was

> working at the time of the injury and the employee who is temporarily, partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.
>
> b. The employer shall communicate an offer of temporary work to the employee in writing, including details of lodging, meals, and transportation, and shall communicate to the employee that if the employee refuses the offer of temporary work, the employee shall communicate the refusal and the reason for the refusal to the employer in writing and that during the period of the refusal the employee will not be compensated with temporary partial, temporary total, or healing period benefits, unless the work refused is not suitable. If the employee refuses the offer of temporary work on the grounds that the work is not suitable, the employee shall communicate the refusal, along with the reason for the refusal, to the employer in writing at the time the offer of work is refused. Failure to communicate the reason for the refusal in this manner precludes the employee from raising suitability of the work as the reason for the refusal until such time as the reason for the refusal is communicated in writing to the employer.

(Iowa Code section 85.33(3)(a-b))

With respect to claimant's employment at Cloverleaf Cold Storage, the parties have a difference of opinion as to why claimant is no longer employed by Cloverleaf. Counsel for claimant argues in his post-hearing brief the following:

> After the November 21, 2017, injury, Shields was scared to go back to work. He loved working and being on a forklift. He had been eager to return to work after the January 26, 2017, injury. However, after he was injured again, he realized he had been hurt twice, and was concerned about it happening again. "What's next?" he said, implying that he knew there was the chance of a worse injury if he returned.
>
> On February 8, 2018, Shields' physician released him back to work – light duty. On February 12, 2018, his [claimant's] mom took him to Floyd Valley hospital to seek mental healthcare treatment. He was anxious and "bouncing off the walls." At the time, Shields was unsure of what caused his anxiety.
>
> At the time Shields began suffering anxiety issues, a case manager named Mary Sullivan had been assigned to monitor his treatment. Shields made Sullivan aware of his mental heal [*sic*] issues. In fact, he communicated a request for a mental health referral directly to Sullivan.
>
> Shields was scheduled for a mental health assessment on February 26, 2018. At the appointment, Shields requested a prescription, but his mental health counselor could not prescribe medication. The mental

> health provider did not communicate to Shields that he could return to work. During Shields' treatment for his work injury with other medical providers he received information regarding whether he could return to work or was under work restrictions. Shields believed that he was allowed to remain off work while receiving mental health treatment. Shields testified that he would have returned to work if instructed. He pointed out that he returned to work the first time with half a foot.
>
> After receiving his mental health assessment on February 26, 2018, no one from Cloverleaf reached out to him to see if he was returning to work. Additionally, Cloverleaf's lawyer had Shields' medical records from his February 12, 2018, mental health visit by February 21, 2018 – five days prior to his assessment at Dean & Associates. Cloverleaf terminated Shields on March 5, 2018. The basis for his termination was that he failed to show up for work. Shields was still receiving mental health treatment when he was terminated.
>
> In June of 2018, Shields reapplied for employment. The position for Shields['] job required the ability to "effectively handle the lifting, pushing, pulling up to sixty pounds frequently." No one at Cloverleaf told Shields whether he qualified physically for the position based on the job description. Shields received an offer for employment, subject to a drug exam. Shields took the drug test at Floyd Valley Medical Center in LeMars [*sic*], IA. Prior to the drug exam, no one at Cloverleaf or Floyd Valley Hospital provided Shields with a list of the drugs that were to be tested. Prior to the drug exam, Shields told the collector that he had an ADHD prescription called Vyvanse that contained amphetamines. Shields knows that amphetamines are in the medication because he's taken several UAs over the years and had to be forthright regarding prescription medications he's taken before. Shields has had the prescription since around 2004. Shields' drug exam came back negative for all substances tested except amphetamines. On July 20, 2018, Shields was notified by Cloverleaf that he had not been hired because his drug exam was positive for amphetamines.

(Cl. post-hearing brief, pp. 6-8) (**CITATIONS PURPOSEFULLY OMITTED)**

Defendants hold a wholly different opinion with respect to claimant and the reason he is no longer employed by defendants. Counsel for defendants writes in the post hearing brief:

> Claimant is alleging that he is entitled to healing period benefits from January 28, 2017 through May 14, 2017 and from November 21, 2017 through April 30, 2018. Defendants do not dispute that claimant is entitled to healing period benefits from January 28, 2017 through May 14, 2017, other than contending that this period should only extend through May 12, 2017 as that is the date which Dr. Rettedal placed claimant at MMI.

Furthermore, Defendants represent that claimant was in fact paid TTD for those dates. However, Defendants vigorously dispute that claimant is entitled to healing period benefits from November 21, 2017 through April 30, 2018.

As discussed in the previous section, claimant was off work from November 28, 2017 until January 17, 2018 for his left ankle sprain. Claimant was then off work for his left foot from January 17, 2018 to February 8, 2018 when Dr. Kensinger released claimant back to work at light duty. **Defendants agree that claimant would be entitled to intermittent TTD from November 28, 2017 through February 8, 2018.** However, February 8, 2018 is the last day that claimant should be entitled to healing period benefits, as claimant was returned to work and refused light duty.

While Claimant will seemingly argue that he was off work due to his mental health treatment in February of 2018, Defendants were never provided a work release from Floyd Valley Hospital in February of 2018, nor were they ever provided a work release from Dr. Inman, the psychologist at Dean & Associates. There is also no evidence that this mental health treatment was causally related to the work injury. The only work release Defendants were provided was the release from CNOS indicating that claimant could come back to work on February 8, 2018 on sedentary duty. Furthermore, claimant even testified that neither Floyd Valley nor Dr. Inman took him off of work in February of 2018.

Despite not hearing from claimant, Defendants made numerous attempts to return claimant to work. On February 13, 2018 Defendants wrote a letter to claimant inquiring as to why he had not yet returned to work as he was released the week prior. Defendants informed claimant that he had until February 20, 2018 to return to work prior to his potential termination due to Defendants[’] attendance policy. Defendants spoke with Claimant on February 22, 2018 where claimant indicated that he would show up the next day. Rather than showing up the next day, claimant sent Defendants a text message with a picture of his car alleging that he hit a snow bank, though this vehicle was the same vehicle he claimed he had an incident with earlier in the week.

Defendants gave claimant an additional opportunity to show up the following week. Claimant did not show up on February 26, after his medical appointment and taking his girlfriend to the emergency room. He was then a no call/no show on February 27, February 28, March 1, and March 2. Only then, after a multitude of opportunities to come back to work, was Claimant terminated via Defendants[’] attendance policy. Even then, he was informed that he was welcome to reapply for employment. Claimant did in fact apply for employment on June 18, 2018 and was

> conditionally hired on June 26, 2018. However, claimant did not pass the drug test as he tested positive for methamphetamine.
>
> In spite of being medically released to do so, Claimant has not worked with Defendants since February 8, 2018. As claimant refused light duty work by repeatedly failing to show up to work and subsequently failing a drug test, and was never released from work due to his mental health treatment in February 2018, claimant should only be entitled to healing period benefits from November 28, 2017 through February 8, 2018.

(Def. post-hearing brief, pp. 18-20) (**Citations purposefully omitted)**

It is the determination of the undersigned; claimant is entitled to healing period benefits for the period from January 27, 2017 through May 12, 2017. On May 12, 2017, Dr. Rettedal declared claimant to be at MMI. This is a period of fifteen (15) weeks. Claimant is also entitled to additional intermittent healing period benefits for the period from November 21, 2017, the date claimant sustained a sprain to his left foot through February 8, 2018. Dr. Kensinger released claimant to return to work on a light duty basis. (Ex. D, p. 6) However, claimant did not return to work. In essence, he refused light duty work as provided by Iowa Code section 85.33(3)(a-b).

Claimant agreed to return to work on Friday, February 23, 2018. He failed to appear for work on that day or to call the manufacturing plant to explain he would not be able to come into the plant. (Ex. E, p. 7) Claimant also had “no calls/no shows” on the following dates: February 27, 2018; February 28, 2018; March 1, 2018; and March 2, 2018. In a letter addressed to claimant, dated March 5, 2018, claimant was terminated for not calling or appearing for work on three consecutive days. (Ex. E, p. 7)

Claimant argues he was off work due to mental health issues. It is true; he was treating for anxiety and possibly post-traumatic stress disorder. Nevertheless, claimant did not notify his employer of his emergency room treatment. Moreover, his treating mental health providers did not remove claimant from work. The same mental health professionals did not place claimant on light duty. Claimant remained incommunicado with members of management at Cloverleaf, even after certain managers tried to contact claimant. Cloverleaf did not learn of claimant’s mental health treatment and its possible relationship to his employment until March 2, 2018. In short, claimant abandoned his job at Cloverleaf. It is the determination of the undersigned; claimant is entitled to intermittent healing period benefits from November 21, 2017 through February 8, 2018. The intermittent weeks where healing period benefits may have been paid are detailed in Claimant’s Exhibit 8, pages 36-37. Neither claimant nor defendants provided the days where intermittent benefits were paid during the weeks between November 21, 2017 and February 8, 2018, and as listed in Claimant’s Exhibit 8, pages 36-37. Claimant is entitled to those intermittent benefits for that period of time.

PERMANENT PARTIAL DISABILITY BENEFITS

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

The next matter for resolution is the nature of claimant's permanency. Claimant alleges he sustained an injury to the body as a whole. Defendants maintain claimant's injury is confined to the left foot only. Dr. Martin's impairment rating is a scheduled member rating to the left foot. Dr. Martin rated claimant as having a 64 percent functional impairment to the left foot. Dr. Martin acknowledged claimant had an antalgic gait pattern. According to Dr. Martin's personal observation, claimant only put pressure on his left foot over the calcaneal tip. (Jt. Ex. 3, pp. 37-38) Additionally, Dr. Martin indicated claimant could return to work as a forklift operator. (Jt. Ex. 3, p. 39)

Dr. Sassman, on the other hand, determined claimant's injury extended into the body as a whole. The independent medical examiner diagnosed claimant with six separate conditions. They were all related to the initial left foot injury on January 26, 2017. The six conditions were previously detailed under the findings of fact. However, they are duplicated below for ease of the reader:

1. Left foot crush injury with subsequent Lisfranc amputation of the left foot and naviculocuneiform fusion on February 21, 2017, and multiple subsequent debridement procedures.

2. Left hip bursitis secondary to a gait change due to #1.

3. Low back pain and bilateral SI joint point secondary to a gait change due to #1.

4. Left knee pain secondary to gait change due to #1.

5. Right hip pain secondary to a gait change due to #1.

6. Left ankle sprain, resolved.

(Cl. Ex. 6, p. 22)

Dr. Sassman opined claimant was not at MMI. Nevertheless, she did provide a permanent impairment rating for claimant. The overall impairment rating included specific ratings for the left foot, the left hip, the low back, and the left knee. While Dr. Sassman opined claimant had mental issues as a result of the January 26, 2017 work injury, she did not provide a permanent impairment rating for those mental issues. Using the Combined Values Chart of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, the total impairment rating was calculated at 25 percent impairment to the body as a whole. (Cl. Ex. 6, p. 24)

Dr. Sassman bolstered her opinion about the cause of claimant's left hip and left knee problems in her deposition. The deposition was taken on October 12, 2018 at 1:00 p.m. in Ankeny, Iowa. During cross-examination, Mr. Sahag questioned Dr. Sassman as follows:

BY MR. SAHAG:

Q. I just want to go back to Mr. Clausen's question about degenerative changes.

A. Okay.

Q. That relates to the left hip and the left knee. He had related those impairment ratings back to the diagnoses and pointed out to you that you didn't use the specific term arthritis. Do you recall that line of questioning?

A. Yes.

Q. My question is: Do you relate the degenerative changes in the left hip and the left knee to Mr. Shields' January 26, 2017 injury?

A. I believe they were aggravated by that injury, not caused by it.

Q. Okay. And do you believe that the aggravation of those preexisting injuries are a substantial factor in bringing about the aggravation and injury?

A. Ask me that again.

Q. Do you believe that – I guess you'd agree that there could be several things that potentially aggravate an injury and you had talked about a gait change.

Do you believe that that gait change or whatever or the injuries that Mr. Shields sustained were a substantial factor in aggravating his left hip and left knee injuries?

A. Yes.

Q. And just to be clear, you relate that to Mr. Shields' work injury?

A. Correct.

(Ex. M, p. 38)

No medical provider retained by defendants rated any body part except the left foot, sprained ankle/lower extremity. Not one defense-retained physician included the back injury, the left hip injury, or claimant's mental health status. The same medical providers did not discuss causation with respect to the back and the left hip or the status of claimant's mental health.

Dr. Martin observed that claimant had an antalgic gait. Mary Gengler, CNP, recognized claimant had an antalgic gait. (Jt. Ex. 1, p. 24) Nurse Gengler injected both of claimant's hips due to pain. (Jt. Ex. 1, p. 28) The certified nurse practitioner treated

claimant's hips because Mary Gengler believed the hip problems were work related. Otherwise, she would not have been authorized to treat claimant.

Reason dictates if one has had a partial amputation of his or her foot, the person would have an altered gait and most likely have back and/or hip issues too. It is the determination of this deputy; the opinions of Dr. Sassman are more persuasive than the opinions of Dr. Martin and the other medical providers retained by defendants. Claimant's January 26, 2017 work injury extends beyond the foot and into the body as a whole.

Since claimant's work injury extends into the body as a whole, he is entitled to have his permanency calculated by the industrial method. Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

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

Claimant has work restrictions per Dr. Sassman. They include limited standing, walking, and sitting on an occasional basis. Additionally, claimant is to eliminate walking on uneven surfaces, climbing ladders, and crawling. The restrictions seem reasonable, given the nature of claimant's amputation, gait issues and problems with his hips and back. It does not seem realistic for claimant to be climbing on ladders and walking for great lengths over uneven ground. Claimant testified, he often loses his balance and falls. No other medical provider imposed work restrictions. A functional capacity evaluation determined claimant could be placed in the heavy physical demand category of labor. (Jt. Ex. 4, p. 41) The heavy category of labor seems extreme when one considers all job situations involving heavy labor such as in the field of construction.

As determined earlier, claimant abandoned his job at Cloverleaf. At the time, he was earning $17.86 per hour plus $.50 per hour as a shift differential. Claimant had no other job opportunities at the time.

On March 23, 2018, claimant tested positive for both amphetamines and methamphetamines. (Jt. Ex. 2, p. 33) Ms. Mary Herman, testified but for the results of the drug screening, claimant would be employed at Cloverleaf.

Claimant was offered the opportunity for re-employment. The employment offer was contingent upon claimant passing a pre-employment drug screening. Unfortunately, he tested positive for amphetamines. (Def. Ex. I, p. 13) Claimant testified the reason he tested positive was because he was taking the prescription medication, Vyvanse (lisdexamfetamine dimesylate CII) for attention deficit hyperactivity disorder (ADHD). Nowhere in the record is there any indication claimant attempted to explain he was taking Vyvanse to the people administering the drug test or to members of management of Cloverleaf. As a consequence, clamant was not re-hired. During cross-examination, claimant admitted he had used methamphetamines seven or eight days prior to the date claimant took his drug test. (Tr., pp. 68-70)

Counsel for claimant retained the services of Mr. Phil Davis, M.S., Vocational Specialist. Mr. Sahag asked Mr. Davis to provide an opinion with respect to the vocational implications that resulted from claimant's work injury on January 26, 2017. (Cl. Ex. 7) Mr. Davis reviewed various medical records, and he interviewed claimant. Mr. Davis concluded the following with respect to claimant's employability following his work injury:

> **CONCLUSION**:
>
> When taking into consideration all of the above stated factors to include Mr. Shields' limited transferable skills, limited education, limited vocational options prior to his injury as a result of his incarcerations, and specifically the permanent restrictions as set forth in case file information, I would opine that Mr. Shields is currently physically unable to return to any of his past employment endeavors.

(Ex. 7, p. 32)

Claimant testified he had sought employment since he had last worked at Cloverleaf. He applied for desk jobs. He applied at convenience stores and at a Hy-Vee grocery warehouse in Cherokee, Iowa. He applied at Tyson's in Storm Lake, Iowa. He applied at American Natural Foods.

He also applied at a temporary employment service in Spencer, Iowa. He did find a temporary position at Quality Refrigerated Services in Spencer, Iowa. At the time of the hearing, claimant was working in the warehouse in the cold freezer and on the docks. For his services he was paid $13.00 per hour. Claimant testified he did not know if he could sustain employment there due to the cold temperatures.

Claimant is not well educated. He appears to be of at least average intelligence. He has taken some college courses. He could benefit from vocational training, if offered to him. Since he is unable to hold a valid driver's license, and he lives in such a small

town, employment opportunities may not be as plentiful as in a larger city such as Sioux City.

After considering all of the factors involving industrial disability; it is the determination of the undersigned; claimant has a permanent partial disability in the amount of forty (40) percent. Defendants shall pay unto claimant two hundred (200) weeks of permanent partial disability benefits commencing from February 9, 2018.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

The next issue for resolution is the issue of the weekly benefit rate. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

At hearing, it was stipulated claimant was married and entitled to two exemptions. Defendants paid claimant a weekly benefit rate of $487.09 based on an average weekly wage of $742.00. Defendants calculated the rate by using a 14-week printout of claimant's wages and hours prior to the date of the injury. The hours included calculating regular, overtime, and vacation hours from the week ending October 22, 2016 to the week ending January 21, 2017. Defendants used 525.92 regular hours, 203.81 overtime hours, and 24 vacation hours, totaling 753.23 hours. The total number of hours (753.23) was then multiplied by $13.80 (the average for six weeks at $13.50 and 8 weeks at $14.00 and divided by 14 weeks used to total an AWW of $742.47). Defendants used married with 2 exemptions with the average weekly wage and determined claimant was entitled to weekly benefits at the rate of $487.09. Defendants did not explain why they used 14 weeks to calculate the average weekly wage instead of 13 weeks.

In his post-hearing brief, counsel for claimant provided charts on how he calculated the average weekly wage and the weekly benefit rate. The charts are duplicated below.

Date	Week	Total Hours	Rate
10/8/2016	1	63.17	13.5
10/15/2016	2	62.87	13.5
10/22/2016	3	71.76	13.5
10/29/2016	4	61.23	13.5
11/5/2016	5	54.9	13.5
11/12/2016	6	52.01	13.5
11/19/2016	7	54.31	13.5
11/26/2016	8	50.22	13.5
12/3/2016	9	57.19	14
12/10/2016	10	57.5	14
12/17/2016	11	50.42	14
12/24/2016	12	61.86	14
12/31/2016	13	51.2	14
1/7/2017	14	41.09	14
1/14/2017	15	42.77	14
1/21/2017	16	39.27	14

Out of the sixteen (16) weeks contained in the table, Shields worked an average of 54.49 hours per week. Thus, when considering the average, Shields asserts that week 14, 15, and 16 are not customary and did not consider those weeks in his rate calculation. The following is Shields' rate calculation arriving at an AWW of $788.13 and rate of $513.42. Exemptions at two (2) is undisputed.

Date	Week	Total Hours	Rate	
10/8/2016	1	63.17	13.5	852.795
10/15/2016	2	62.87	13.5	848.745
10/22/2016	3	71.76	13.5	968.76
10/29/2016	4	61.23	13.5	826.605
11/5/2016	5	54.9	13.5	741.15
11/12/2016	6	52.01	13.5	702.135
11/19/2016	7	54.31	13.5	7333.185
11/26/2016	8	50.22	13.5	677.97
12/3/2016	9	57.19	14	800.66

12/10/2016	10	57.5	14	805
12/17/2016	11	50.42	14	705.88
12/24/2016	12	61.86	14	866.04
12/31/2016	13	51.2	14	716.8
Total			sum/13	788.1327

(Cl. Brief, p. 19)

Claimant indicated he skipped the weeks of January 7, 2017; January 14, 2017; and January 21, 2017. Claimant stated the weeks were not customary. However, he did not explain why the weeks were not customary. Instead, claimant added in the weeks of October 8, 2016; October 15, 2016; and October 22, 2016. In viewing those weeks, one could view, those 3 weeks as not customary weeks also.

It appears the most realistic representation of claimant's average weekly wages is the version attached to defendants' brief. It is marked Exhibit A. The chart is duplicated below. The undersigned accepts the average weekly wage as $769.19. The weekly benefit rate for claimant who was married and entitled to 2 exemptions on the date of his work injury is $502.54. All weekly benefits, both healing period and permanency benefits, shall be paid at the rate of $502.54. Since this rate is greater than the rate previously paid to claimant, an underpayment of $15.45 is due for all past benefits paid.

Week Ending	Reg Hours	OT Hours	Other Hours	Total Hours	Rate of Pay	Total	
1/28/2017	32	1.51	8	41.51	$14.00	$581.14	NOT REPRESENTATIVE
1/21/2017	37.92	1.35		39.27	$14.00	$549.78	
1/14/2017	40	2.77		42.77	$14.00	598.78	
1/7/2017	24	9.09	8	33.09	$14.00	$463.26	NOT REPRESENTATIVE
12/31/2016	32	11.2	8	43.2	$14.00	$604.80	NOT REPRESENTATIVE
12/24/2016	40	21.86		61.86	$14.00	$866.04	
12/17/2016	40	10.42		50.42	$14.00	$705.88	
12/10/2016	40	17.5		57.5	$14.00	$805.00	
12/3/2016	40	17.19		57.19	$14.00	$800.66	
11/26/2016	32	18.22	8	50.22	$13.50	$677.97	NOT REPRESENTATIVE
11/19/2016	40	14.31		54.31	$13.50	$733.19	
11/12/2016	40	12.01		52.01	$13.50	$702.14	
11/5/2016	40	14.9		54.9	$13.50	$741.15	
10/29/2016	40	21.33		61.23	$13.50	$826.61	

10/22/2016	40	31.76		71.76	$13.50	$968.76	
10/15/2016	40	22.87		62.87	$13.50	$848.75	
10/8/2016	40	23.17		63.17	$13.50	$852.80	

	Total	$9,999.52
AWW	$9,999.52/13 weeks	$769.19
	M2	$502.54

(Def. post-hearing brief Ex. A)

Claimant is requesting payment for the cost of the independent medical examination with Dr. Sassman. The total cost of the bill was $4,735.90. The report was $2,651.00.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

In the present case, defendants are liable for the cost of the independent medical examination in the amount of $4,735.90. Defendants retained the services of Dr. Martin to render a permanent impairment rating. On May 12, 2017, Dr. Martin provided a 64 percent impairment of the foot. (Jt. Ex. 3, p. 39) Claimant determined the rating was too low. As a consequence, counsel for claimant retained the services of Dr. Sassman to provide an independent medical examination with a subsequent report. Dr. Sassman examined claimant on June 27, 2018 and the physician issued her report on August 15, 2018. Claimant complied with the requirements of Iowa Code section 85.39. Defendants shall reimburse counsel for claimant for the costs of Dr. Sassman's examination and report.

The final issue for determination is the matter of costs. Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and

> 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Counsel for claimant did not attach an itemization of costs beyond the costs for Dr. Sassman. Therefore, the only other costs to assess are those to cover the filing fee and the service fees

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant two hundred weeks (200) weeks of permanent partial disability benefits commencing from February 9, 2018 and payable at the rate of five hundred-two and 54/100 dollars ($502.54).

Defendants shall pay unto claimant healing period benefits for the period from January 27, 2017 through May 12, 2017. Defendants shall also pay unto claimant additional intermittent healing period benefits for the period from November 21, 2017 through February 8, 2018. All healing period benefits shall be paid at the rate of five hundred-two and 54/100 dollars ($502.54). Previously paid healing period benefits shall be paid at the correct rate of five hundred two and 54/100 dollars ($502.54). Accrued benefits, including the benefits paid at an incorrect weekly benefit rate, shall be paid in a lump sum together with interest as detailed in the body of the decision.

Defendants shall pay the costs of the independent medical examination and report of Robin Sassman. M.D., MPH, in the amount of four thousand seven hundred thirty-five and 90/100 dollars ($4,735.90).

Defendants shall pay the costs to litigate as detailed in the body of the decision.

The attorneys of record, if they have not already done so, shall register within seven (7) days of this order in Workers Compensation e-Filing System (WCES) and as a participant in this case to receive future filings from this agency.

Defendants shall file all reports as required by law.

Signed and filed this _____1st_____ day of November, 2019.

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Matthew Sahag (via WCES)
Timothy Clausen (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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.