BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KELLY J. RINKEN, Claimant, vs. MENARD, INC., Employer, and XL INSURANCE AMERICA, INC., Insurance Carrier, Defendants.	:	File No. 5060890 A R B I T R A T I O N D E C I S I O N Head Notes: 1108, 1803, 1803.1, 1703, 2502

STATEMENT OF THE CASE

This is a petition in arbitration. The contested case was initiated when claimant, Kelly J. Rinken, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on January 18, 2018. Claimant alleged he sustained a work-related injury on May 12, 2017. Claimant alleged the work injury affected his left lower extremity, his low back and his body as a whole. (Original notice and petition)

For purposes of workers' compensation, Menard, Inc., is insured by XL Insurance America, Inc. Claimant testified on his own behalf. Mr. Dale A. Dickman also testified. He is the general manager at the Menard's store in Spencer, Iowa. Defendants filed their answer on February 6, 2018. Defendants accepted the claim for the left lower extremity injury. Defendants denied liability for the low back and body as a whole injury. A first report of injury was filed on June 29, 2017.

The hearing administrator scheduled the case for hearing on February 28, 2019. 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.

Claimant testified at hearing. The parties offered joint exhibits 1 through 4. Claimant offered exhibits 1 through 9. Defendants offered exhibits A through H. The exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on April 5, 2019. 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 May 12, 2017 to the left lower extremity which arose out of and in the course of his employment;

3. The parties agree the injury resulted in both temporary and permanent disability to the left lower extremity;

4. Temporary or healing period benefits are no longer in dispute;

5. The parties agree the weekly benefit rate is $314.00 per week;

6. Defendants have waived any affirmative defenses;

7. Medical benefits are no longer in dispute;

8. Prior to the hearing date, defendants have paid thirty-one (31) weeks of permanent partial disability benefits in the amount of $320.86 per week prior to the date of the hearing;

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

ISSUES

The issues presented are:

1. Whether claimant sustained an injury to his back and to his body as a whole as a result of a work injury on May 12, 2017;

2. Whether the alleged injury to the back is causally related to any temporary or permanent disability;

3. Whether the alleged injury to the back resulted in a permanent partial disability;

4. Whether the alleged injury to the back resulted in an industrial disability;

5. The extent of permanent disability to the left lower extremity to which claimant is entitled to benefits;

6. Whether the commencement date for the payment of any permanent partial disability benefits is January 23, 2018 or August 31, 2018; and

7. Claimant is requesting the payment of an independent medical evaluation pursuant to Iowa Code section 85.39.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and Mr. Dickman at hearing, after judging the credibility of the two people who testified, and after reading the evidence, 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 57 years old. He is single. Claimant has three adult children. He resides in Spencer, Iowa. The population of the city is slightly greater than 11,000. Claimant has an eleventh grade education. He does not have a general equivalency diploma.

Claimant has suffered from type 2 diabetes for over twenty years. He has not always been compliant with the medical restrictions imposed on an individual who suffers from diabetes. Prior to the May 12, 2017 work injury, claimant had a toe amputated from his right foot. He also suffered from neuropathies in his feet which resulted in poor sensitivity in each foot. Additionally, outside of the work setting, claimant placed his foot too close to a space heater. He burned his foot. As a result, he had one half of his foot removed. He was left without any toes.

Claimant commenced employment with Menard, Inc. on April 11, 2013. He was hired to work as a stock person. Later, he was transferred to the hardware and garden departments to stock shelves and to wait on customers. Claimant testified he enjoyed his job.

On May 12, 2017, claimant was injured on the job when he and several other employees were attempting to retrieve a “half whiskey barrel” for a customer. There was a stack of the barrels. The stack tipped. It fell onto claimant and knocked him to the ground. He landed onto his buttocks. The stack landed on claimant’s left foot, ankle and leg. Claimant was transported to the emergency room at Spencer Hospital. (Joint Exhibit 1, page 2)

Andrew Pick, D.O., an orthopedic surgeon, diagnosed claimant with a “Deep laceration of the left lower leg.” (Jt. Ex. 1, p. 3) Dr. Pick sutured the wound and placed a

negative pressure dressing on the wound. (Jt. Ex. 1, p. 3) Dr. Pick prescribed a walking boot for claimant.

On the date of the accident, a drug test was administered to claimant. (Ex. A, p. 1) The company administered the test because of the work injury. (Ex. A, p. 1) The results of the test were positive for marijuana, amphetamine, and methamphetamine. (Ex. A, p. 1)

Members of management informed claimant; if he wanted to remain employed with Menard Inc., he would have to engage in rehabilitation for chemical dependency. Claimant acquiesced. He attended rehabilitation two days per week. (Ex. G, p. 16) Claimant was off work from May 12, 2017 through June 9, 2017. (Ex. G, p. 16)

Claimant returned to Dr. Pick one week after his emergency room care. (Jt. Ex. 2, p. 33) Dr. Pick provided the following work restrictions for claimant:

No lifting greater than 10 lbs.

No prolonged or heavy pushing/pulling

No repeated bending or twisting

Limited standing

No operating hazardous machinery

May return to work 4 hours/day for 2 weeks, then 10 hours/day

No standing longer than 30 min at a time with 20 min break

F/U 1 wk

(Jt. Ex. 2, p. 34)

On May 26, 2017, claimant returned to Dr. Pick. Claimant did not wear his boot as instructed by his orthopedic surgeon. Dr. Pick indicated in his clinical report for the same date, “a significant amount of pitting edema in the ankle and foot.” (Jt. Ex. 2, p. 31) Dr. Pick did not believe claimant was being very compliant with his boot and with elevating his left lower extremity. The orthopedist ordered a compression sock. (Jt. Ex. 2, p. 31) Claimant’s laceration site was healing and Dr. Pick removed the sutures. (Jt. Ex. 2, p. 31)

The next appointment with Dr. Pick occurred on June 9, 2017. Claimant did not obtain the compression socks that were prescribed. He had not been wearing his boot. (Jt. Ex. 2, p. 29) Dr. Pick discussed claimant’s continued problems with his neuropathy. (Jt. Ex. 2, p. 29) Claimant reported he had been back to full activity at work. (Jt. Ex. 2, p. 29) Claimant was returned to work without any restrictions. (Jt. Ex. 2, p. 30)

On June 23, 2017, Dr. Pick ordered decongestive therapy. (Jt. Ex. 2, p. 27) Decongestive therapy is the management tool for lymphedema. Claimant did obtain a compression sock, but he thought it was too tight on his lower extremity. Consequently, claimant cut holes in the stocking to provide more room.

Dr. Pick took radiographs of the left lower extremity. The results demonstrated:

> Radiology: 2 views of the left tibia and fibula along with 3 views of the left foot were done in the office today. There appears to be a distal fibula fracture below the syndesmosis without displacement. It is healing. There is good bony bridging of the medial aspect. There is also evidence of a fifth metatarsal pseudo-Jones fracture below the level of the fourth and fifth articulation. It is in good alignment and healing. There is no other fracture or malalignment noted.

(Jt. Ex. 2, p. 26)

Dr. Pick did not recommend any surgical procedures for the fractures. He opined the fractures were healing "nicely" on their own. (Jt. Ex. 2, p. 26)

Tessa Rockwell, DPT, CLT, interviewed and examined claimant at the Spencer Hospital on June 23, 2017. The purpose of the examination was to determine the extent of decongestive therapy claimant would need for his left ankle and foot fracture. (Jt. Ex. 1, p. 9) The medical records noted two sessions of lymphedema therapy. (Jt. Ex. 1, pp. 11-19)

On July 26, 2017, claimant visited with his personal medical provider, Jamie Hicks, NP-C., at Hicks Family Healthcare, LLC. (Jt. Ex. 4, p. 127) Claimant sought another prescription for hydrocodone. Claimant indicated he was experiencing pain in his left ankle and legs. (Jt. Ex. 2, p. 128) The nurse practitioner declined to fill any prescription for pain medication.

Claimant returned to Dr. Pick on August 4, 2017. (Jt. Ex. 2, p. 22) Claimant informed his orthopedist that he went to the lymphedema clinic but claimant did not feel the therapy was helpful. He discontinued the treatment on his own. (Jt. Ex. 2, p. 22)

Also, on August 4, 2017, claimant first discussed a back pain issue with a medical provider. Dr. Pick's notes for the same date reflected the following:

> …He still complains of pain in the lateral ankle but feels as though the foot pain has improved. He also went to his family doctor for more hydrocodone. He notes that he has back pain and is seeing his family practice doctor about that.

(Jt. Ex. 2, p. 22) Dr. Pick recommended a bone stimulator for claimant's left ankle and left lower extremity. (Jt. Ex. 2, p. 22) Claimant was asked to return in six weeks. (Jt.

Ex. 2, p. 22) Dr. Pick authorized claimant to use an air cast at work and to wear compression socks. (Jt. Ex. 2, p. 24)

Additionally, on August 4, 2017, claimant notified members of management he was experiencing low back pain. (Ex. H) The employer authorized claimant to seek treatment at Spencer Chiropractic & Wellness Center. (Jt. Ex. 3, p. 38)

Claimant's exhibit 7, page 42 is a written notice from claimant and his attorney of an alleged back injury with an injury date listed as May 12, 2017. The notice of injury was dated August 4, 2017.

Claimant's exhibit 8, page 43 is a written notice from claimant and his attorney of an alleged back injury with an injury date listed as February 25, 2018. The notice of injury was dated May 23, 2018. No original notice and petition was filed for the alleged injury date of February 25, 2018.

The initial chiropractic appointment occurred on August 7, 2017. (Jt. Ex. 3, p. 38) Lee Malmstrom, D.C., commenced treatment of claimant for: Lumbar spondylosis without radiculopathy; lumbar subluxation-segmental dysfunction; sacral-subluxation-segmental dysfunction; myalgia; pain in thoracic spine; thoracic subluxation-segmental dysfunction; pain in left ankle; and, joints of the left foot. (Jt. Ex. 3, pp. 47-48) Dr. Malmstrom indicated the primary treatment would consist of chiropractic manipulative therapy. (Jt. Ex. 3, p. 47)

Dr. Malmstrom treated claimant on 49 separate occasions. The final appointment occurred on August 31, 2018. The chiropractor opined claimant's condition had not yet stabilized. Dr. Malmstrom opined:

> **TREATMENT PLAN:**
>
> Kelly's condition has not stabilized. His ankle injury affects his gait and that puts more stress on his back. Mobility restrictions in his lower extremities makes him use excessive lumbar flexion with bending.
>
> Is showing some gradual pain desensitization but struggling with daily movement habits.

(Jt. Ex. 3, p. 125) Claimant was advised to return in one month, but he failed to make another appointment. (Jt. Ex. 3, p. 126)

Pursuant to a request from defense counsel, Timothy Clausen, Dr. Pick provided an impairment rating for the left lower extremity. The report was issued on August 7, 2018. In the report, Dr. Pick opined claimant had a permanent impairment rating of 14 percent to the left lower extremity. Dr. Pick calculated the impairment rating as follows:

> Kelly Rinken has been under my care for a Workers' Compensation-related injury with Menard's. He has done well from a previous skin tear

> along with fractures to the base of the 5th metatarsal, lateral malleolus, and medial malleolus. He has returned to work without restriction at this time. He has no permanent restrictions. He does have loss of motion due to his injuries that is permanent. He is able to dorsiflex and plantarflex 20 degrees. Ankle pronation and supination have remained intact. According to the American Medical Association Guides to the Evaluation of Permanent Impairment, he does receive mild impairments with dorsiflexion and plantar flexion. This equates to a total of 6% whole-person impairment, 14% lower extremity impairment, and 20% foot impairment. Once again, these will be permanent. He is otherwise maximally medically improved as of January 23, 2018, which was the last day I saw him.

(Ex. B, p. 2)

Counsel for claimant sent his client for an independent medical evaluation with Robin L. Sassman, M.D. The evaluation occurred on November 8, 2017. Dr. Sassman requested radiographs of the left ankle. Nicholas Sullivan D.O., interpreted the radiographs as:

> **IMPRESSION:**
>
> **Acute appearing fracture along the medial malleolus with minimal inferior displacement of the distal fracture fragment. There is lateral and medial soft tissue swelling of the ankle appear [sic].**

(Ex. 1, p. 11)

During the November 8, 2017 appointment, Dr. Sassman examined claimant's back, right and left knees, and right and left ankles. The report was not issued until April 11, 2018. The evaluating physician diagnosed claimant with:

> **Diagnoses:**
>
> 1. Left ankle laceration.
>
> 2. Distal fibula fracture and medial malleolus fracture.
>
> 3. 5th metatarsal fracture.
>
> 4. Low back pain.

(Ex. 1, p. 6)

Dr. Sassman indicated claimant had a slow gait with an obvious limp. (Ex. 1, p. 5) Claimant was able to heel and toe walk on the left. He could not squat and recover. (Ex. 1, p. 5) Claimant was tender to the touch over the lumbar spinous processes. (Ex.

1, p. 5) Reflexes were 2+/4 at the patella and ankle bilaterally. (Ex. 1, p. 5) Sensory examination was not intact at the left foot. (Ex. 1, p. 6) Additionally, Dr. Sassman noted:

> He had an 18 cm scar over the anterior aspect of the left ankle. He was numb from this area to the toes on the medial, anterior and lateral aspect of the foot. The numbness on this side was significantly worse than the numbness on the right foot and ankle (from the neuropathy.[)]

(Ex. 1, p. 6)

With respect to causation of the aforementioned diagnoses, Dr. Sassman opined:

> **Causation:**
>
> All opinions are expressed within a reasonable degree of medical certainty.
>
> It is my opinion that the incident that occurred on May 12, 2017, is directly and causally related to the above diagnoses. It was on this date that Mr. Rinken was attempting to move a stack of wine barrels when the stack came down on his left ankle. He then fell to the ground on his buttocks. Because he denies having any of these symptoms prior to this incident occurring, and there is no evidence in the currently available record that he sought care for such symptoms prior to this incident occurring, I am led to this conclusion.

(Ex. 1, pp. 6-7)

Dr. Sassman provided a permanent impairment rating for both the left lower extremity and the lumbar spine. (Ex. 1, pp. 7-8) The total permanent impairment for the left lower extremity was 17 percent. The total permanent impairment for the lumbar spine was 5 percent to the lumbar spine. (Ex. 1, p. 8) When the two impairments were combined, the total equaled 12 percent impairment to the body as a whole. (Cl. Ex. 1, p. 8)

Specifically, with respect to the left lower extremity, Dr. Sassman calculated the impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Ed., as follows:

> With regard to the laceration, Mr. Rinken continues to have numbness over the medial, anterior and lateral ankle in the distribution of the sural, superficial peroneal and saphenous nerves.
>
> For the sensory loss associated with the sural nerve of the left leg, using Table 17-37 on page 552, he will be assigned an initial 2% left lower extremity impairment. Following the instructions on page 550, this value must be multiplied by a value from Table 16-10 page 482. I would assign

him to grade 3 and use a 60% modifier. When these values are multiplied together (2% x 60%) this is 1.2% lower extremity impairment. Following the instructions on page 20 this is rounded to 1% lower extremity impairment.

For the sensory loss associated with the saphenous nerve of the left leg, using Table 17-37 on page 552, this nerve is not listed. Therefore, the sural nerve will be used due to its anatomic proximity. Using the sural nerve, he will be assigned an initial 2% left lower extremity impairment. Following the instructions on page 550, this value must be multiplied by a value from Table 16-10 page 482. I would assign him to grade 3 and use a 60% modifier. When these values are multiplied together (2%x 60%) this is equal to 1.2% lower extremity impairment. Following the instructions on page 20 this is rounded to 1% left lower extremity impairment.

For the sensory loss associated with the superficial peroneal nerve of the left leg, using Table 17-37 on page 552, he will be assigned an initial 2% left lower extremity impairment. Following the instructions on page 550, this value must be multiplied by a value from Table 16-10 page 482. I would assign him to grade 3 and use a 60% modifier. When these values are multiplied together (2% x 60%) this is 1.2% lower extremity impairment. Following the instructions on page 20 this is rounded to 1% left lower extremity impairment.

For the loss of range of motion, using Table 17-11 on page 537 and 17-12 on page 537, he can be assigned 7% lower extremity impairment for loss of dorsiflexion and 2% lower extremity impairment for loss of inversion. These are added together for a total of 9% lower extremity impairment. For degenerative changes, no ratable impairment exists. For the fracture based on Table 17-22 on page 547, no ratable impairment exists.

For the 5th Metatarsal fracture, based on Table 17-33 on page 547, he can be assigned 5% lower extremity impairment.

For the left lower extremity, using the combined Values Chart on page 604 for the left lower extremity, 9% lower extremity impairment (for the left ankle range of motion) is combined with 5% lower extremity impairment (for the 5th metatarsal fracture), 1% lower extremity impairment (for the sensory loss of the saphenous nerve), 1% lower extremity impairment (for the sensory loss of the sural nerve) and 1% lower extremity impairment (for the loss of the superficial peroneal nerve) for a total of 17% lower extremity impairment. Using Table 17-3 on page 527, this is converted to 7% whole person impairment.

(Ex. 1, pp. 7-8)

Dr. Sassman imposed restrictions upon claimant's work. Claimant was advised to limit lifting, pushing, pulling, and carrying to 30 pounds on an occasional basis only. Claimant was instructed to limit standing and walking. He was told not to climb on ladders or to walk on uneven surfaces. Claimant was advised to limit his use of stairs to a rare basis. Finally, Dr. Sassman informed claimant to refrain from using his left foot to operate foot controls. (Ex. 1, p. 8)

Subsequent to the issuance of Dr. Sassman's independent medical examination and report, defendants contacted Dr. Pick for his impressions and comments. (Ex. C, p. 3) Dr. Pick disagreed with many of the opinions expressed by Dr. Sassman. Firstly, Dr. Pick opined claimant reached maximum medical improvement on January 23, 2018. Claimant was not in need of any additional medical treatment for his left lower extremity after that date. With respect to treatment and appropriate work restrictions, Dr. Pick opined:

> I had treated Kelly originally for a large laceration. He did well with that, but continued to have pain. Ankle x-rays were ordered, demonstrating fractures of the distal fibula, medial malleolus, and base of the 5th metatarsal. All were stable at the time and in good alignment and position. I had presumed these injuries were from his original date of injury. He has had bad diabetic neuropathy with longstanding diabetes. He has a smoking history. It was difficult to diagnose this, as he was unable to feel the pain from these fractures. I did treat him in a boot and provided a bone stimulator. Repeat x-rays did not show any instability of the ankle mortise or fracture. He is at risk of nonunion and will likely develop a fibrous nonunion in regards to this. He seemed to have no pain on further followup. I ultimately did release him with maximum medical improvement and gave him a disability rating due to his loss of motion. I would not necessarily recommend further treatment at this time.

(Ex. C, p. 3)

Dr. Pick acknowledged claimant mentioned he had low back pain during his appointment on August 4, 2017. However, Dr. Pick stated claimant never reported the low back pain was the result of the work injury on May 12, 2017. (Ex. C, p. 3) Dr. Pick opined, "I cannot correlate a low back injury to that date of injury versus chronic low back pain." (Ex. C, p. 3) Dr. Pick wrote in his report of September 27, 2018:

> I do not have documentation relating low back pain to his date of injury. I, therefore, cannot necessarily link his low back pain to the injury versus possible chronic condition.

(Ex. C, p. 4)

As far as permanent work restrictions, Dr. Pick indicated how his opinions differed from Dr. Sassman's opinion. Dr. Pick wrote on September 27, 2018:

> Dr. Sassman assigns permanent restrictions as follows: Mr. Rinken is to limit lifting, pushing, pulling, and carrying of 30 pounds occasionally. He should limit standing and walking on an occasional basis. He should not walk on uneven surfaces or use ladders. He should limit his use of stairs to a rare basis. He should not use the left foot to operate foot controls. Do you concur with these restrictions? If not, why?
>
> > I think these are reasonable restrictions, considering his overall condition. In regards to his ankle, my last encounter with Kelly notes that he had some pain and swelling at the end of the day. He was happy with where he was at and was no longer wearing a compression stocking. He had been back to work without restrictions, in normal shoe wear. In that case, I would not necessarily give him any of those specific restrictions relating to his ankle. It is not necessarily related to his chronic low back pain or back injury.

(Ex. C, p. 4)

Defense Counsel desired an independent medical examination from Wade K. Jensen, M.D., an orthopedic surgeon at CNOS, PC, in Dakota Dunes, South Dakota. Dr. Jensen is an orthopedic surgeon who has been practicing with CNOS, PC since 2008. Dr. Jensen examined claimant on December 3, 2018. The evaluating physician also reviewed various medical and chiropractic records relevant to claimant's claim. Dr. Jensen was asked to examine claimant's lumbar spine and to render an opinion as to causation and permanency. (Ex. D, p. 5)

With respect to the low back portion of the present claim, claimant related to Dr. Jensen:

> …He did state at the time of the incident he did fall in the process. He never complained of low back pain at the time of the injury nor did he complain of low back pain until he returned to work 3 months later. Three months later, he was admittedly deconditioned. He had not done much with regard to his back and began to have increasing low back pain at work. He does not state that he has had low back pain in the past. When he did get back pain, it was mostly in the very low level, a little bit on the left side and rarely into upper buttocks. It depended on his activity level. He worked from somewhere in early August when he claimed he had low back pain on 08/04/2017 until 02/25/2018 when he was asked to help lift a snowblower off a shelf that was about chest high. The snowblower weighed about 100 to 150 pounds per the patient and he and a manager helped to pull this off the rack. He did not recognize any injury per se at the very moment but the next day, he had severe low back pain and he stayed off work for the next 3 days but then he was back to basically his baseline normal level of low back pain that he was having and was back to work doing his normal job. He was on a 30-pound lifting restriction

> essentially this whole time placed by Dr. Pick. He has never complained of clear radicular complaints in his lower extremity. He has always complained of primarily low back pain.

(Ex. D, p. 5)

Dr. Jensen ordered imaging studies of the lumbar spine. (Ex. D, p. 6) According to Dr. Jensen, the studies showed:

> …normal-appearing lumbar spine radiographs with really normal-appearing disk spaces throughout. No spondylolisthesis or spondylolysis. At L1-2 level on the left side, there is a chronic osteophyte, which are not uncommon in an aged 56-year-old spine but I see no chronic abnormalities associated with this. I would consider this a normal age-related finding.

(Ex. D, p. 6)

Dr. Jensen diagnosed claimant with:

1. Myofascial low back pain, likely deconditioning related primarily.
2. No evidence of radiculopathy.
3. No evidence of fractures of lumbar spine.
4. Chronic diabetes affecting lower extremity function.

(Ex. D, p. 6)

Dr. Jensen opined claimant did not sustain an injury to his low back as a result of the injury that occurred on May 12, 2017. (Ex. D, p. 6) Additionally, Dr. Jensen determined claimant did not sustain an injury to his back because he had an altered gait stemming from his fall on May 12, 2017. (Ex. D, p. 6) Additionally, Dr. Jensen opined claimant did not sustain a permanent partial impairment to his lumbar spine. (Ex. D, p. 6) Dr. Jensen recommended claimant engage in a home exercise program for his lumbar spine. (Ex. D, p. 7) Dr. Jensen maintained, claimant did not need other forms of medical treatment, including chiropractic care. (Ex. D, p. 7) Additionally, Dr. Jensen opined claimant did not need any restrictions for his lumbar spine. (Ex. D, p. 7)

With respect to the incident on February 25, 2018 when claimant lifted a snowblower from a shelf at the store, Dr. Jensen opined claimant sustained only a temporary muscle strain. (Ex. D, p. 7) Dr. Jensen opined the temporary muscle strain should have resolved within a week. (Ex. D, p. 7)

Dr. Jensen, took issue with the opinions of Dr. Sassman. Dr. Jensen opined he found some inconsistencies in the report authored by Dr. Sassman. The inconsistencies were:

> Please note that after my complete review of the records, I also noted some inconsistencies in some of the records that I would like to bring to your attention, specifically the independent medical examination performed by Dr. Robin Sassman. It states that the patient has been given an impairment rating for injury to the sural nerve, the superficial peroneal nerve, and the saphenous nerve. I find it much more likely that these disabilities are related to his diabetes than I do related to an injury. Specifically, the sural nerve is not even remotely close to the anatomic location of his cut. The superficial peroneal nerve is unlikely related given where this cut occurred and the saphenous nerve would be the most likely related but I think may be more medial to this. Thus, I would rely heavily on the opinion of the operating surgeon and what he found in his operative findings to support whether his chronic numbness and tingling that he has in the lower extremity it [sic] related to the actual injury or if this is a chronic problem from his diabetes.

(Ex. D, p. 7)

Claimant testified when he was injured on May 12, 2017, he was knocked to the ground. Claimant indicated he injured his lower spine during the fall. Claimant explained he did not experience immediate pain in his back because the pain was masked by the hydrocodone claimant was taking as pain medication. Claimant stated the correct injury date for the spine was May 12, 2017. Claimant testified defendants paid for all chiropractic treatments.

Dale A. Dickman testified for defendants. He is the general manager at the Menard's store in Spencer, Iowa. Mr. Dickman testified he has been the store manager since 2010. He testified he was present on May 12, 2017 when claimant sustained his work injury. Mr. Dickman testified claimant made no complaint of any back pain on the date of the work injury. Moreover, on the date in question, claimant stated, "I don't feel any pain."

The general manager testified the first time he heard of any back complaints from claimant was on August 4, 2017. Claimant was working full duty. At the time, claimant reported he hurt his back while he was putting away freight. Mr. Dickman testified he believed the back injury was a distinct injury from the May 12, 2017 work injury. The general manager had no understanding that claimant's back pain was the result of the injury on May 12, 2017. Moreover, Mr. Dickman testified, claimant never reported the May 12, 2017 incident caused any back injury. The general manager stated, shortly after August 4, 2017, he made the decision to send claimant to the Spencer Chiropractic and Wellness Center. Mr. Dickman indicated the chiropractic clinic was the place where the Spencer employees of Menard, Inc., were routinely sent for back treatments. The general manager testified, claimant never requested medical treatment beyond the chiropractic care he received at the Spencer Chiropractic and Wellness Center.

Mr. Dickman testified about a snowblower incident that occurred on February 25, 2018. The witness testified he did not order claimant to remove a snowblower from a shelf. The store manager stated he told another co-worker, by the name of Andrew to find other workers to assist Andrew in removing the snowblower from the shelf and placing it in the storeroom.

There was evidence to establish claimant had a second urine screening for chemical substances on August 6, 2018. (Ex. F, p. 12) Claimant denied at hearing he was using any unauthorized chemical substances during the time he was tested. However, claimant did not believe he could convince members of management he was "clean". As a consequence, claimant did not return to work after he received the results of his second urine analysis. During cross examination, claimant admitted but for his positive urine analysis and his job abandonment, he would still be working for Menard, Inc.

The general manager testified claimant was terminated by corporate management because he abandoned his job. According to Mr. Dickman, claimant failed to appear for work on three separate shifts. The termination occurred in September of 2018. The witness testified at the time claimant was terminated, Mr. Dickman had no idea why claimant did not appear for work.

CONCLUSIONS OF LAW AND RATIONALE

PERMANENT PARTIAL DISABILITY BENEFITS

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa

1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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

The first issue for determination is the matter whether claimant sustained an injury to his back as a result of his stipulated work injury on May 12, 2017. Defendants have admitted an injury occurred to claimant's left lower extremity on May 12, 2017. They have vigorously denied any injury occurred to the back on that date.

The medical records for May 12, 2017 are devoid of any references to a back injury on that date. Claimant did not report an injury to his back to anyone associated with Menard, Inc. or to any medical providers on the date of the work injury. Claimant testified he did not experience pain in his back because he was taking so many prescriptions for pain. According to claimant, the "pain pills" were masking his back pain. The undersigned finds claimant's statement less than credible. Claimant was continually requesting narcotic pain medication from his medical providers. If claimant was pain free as claimed, he would not have been requesting refills for Hydrocodone. Claimant was telling his medical providers he was experiencing pain and in need of narcotic pain medication. Nevertheless, at hearing, he testified the pain pills masked his pain. The two statements are in direct conflict with one another.

Claimant did not discuss a back pain issue with any medical provider until August 4, 2017. This was almost three months after the work injury. Claimant had an appointment on August 4, 2017 with Dr. Pick, the orthopedist, who treated the left lower extremity. Dr. Pick's notes mentioned claimant was seeing his family doctor about back pain. Claimant did not indicate the back pain was related to the work injury on May 12, 2017. This deputy did not find any indication where claimant had told Ms. Hicks that he had sustained a back injury as a result of his original work injury.

Next, there was claimant's report of a back injury on August 4, 2017. Claimant notified his employer he injured his back while moving stock. A first report of injury was filed for the back injury. The employer listed the date it had notice as August 4, 2017.

(Ex. H) Claimant did not file a contested case proceeding with the Iowa Division of Workers' Compensation for the alleged injury date of August 4, 2017.

Claimant commenced chiropractic care on August 7, 2017 pursuant to direction from the store manager, Mr. Dickman. The appointment was arranged after claimant had provided verbal notice of his work injury on August 4, 2017. Defendants paid for all the chiropractic care pursuant to the reported work injury of August 4, 2017. Once the final appointment occurred on August 31, 2018, claimant concluded his treatment for his low back. He did not request additional care.

Then there was the credible testimony of Mr. Dickman. He related entirely different facts surrounding the various incidents on May 12, 2017, August 4, 2017, and February 25, 2018. Mr. Dickman was able to recall specific details about each of the three dates discussed at the arbitration hearing. The store manager also recalled the people present on the three dates in question. The undersigned concludes Mr. Dickman was a very credible witness who could recall specific details, and names of persons present on given dates. Mr. Dickman testified claimant did not attribute his back pain to the work injury on May 12, 2017.

During the hearing, claimant also alleged he sustained an injury to his back when he lifted a snowblower from a shelf at work. Claimant alleged the incident occurred on February 25. 2018. Again, claimant did not file a contested case with the Iowa Division of Workers' Compensation for any alleged work injury on February 25, 2018. The hearing on February 28, 2019 could not award benefits for any alleged injury dates except the May 12, 2017 date. Claimant is unable to claim entitlement to benefits for the alleged dates of August 4, 2017 and February 25, 2018.

It is the determination of the undersigned; claimant is unable to prove by a preponderance of the evidence he sustained an injury to his back as a result of his work injury on May 12, 2017.

The second issue for determination is the extent of permanent disability to which claimant is entitled for his left lower extremity. Prior to the hearing, defendants paid to claimant thirty-one (31) weeks of permanent partial disability benefits at the rate of $320.86 per week. Defendants allege the permanency benefits commenced on January 23, 2018, the last date claimant saw Dr. Pick. Claimant alleges the permanency benefits commenced on August 31, 2018, the last date claimant had chiropractic care for his back. The parties agree the weekly benefit rate is $314.00 per week.

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).

Dr. Pick opined claimant reached maximum medical improvement on January 23, 2018. (Ex. B, p. 2) This was the last date Dr. Pick saw claimant for his work injury. January 23, 2018 was the final date on which claimant received treatment for his left leg/lower extremity. Claimant had returned to work and was able to wear normal foot wear. (Ex. C, p. 4) It is the determination of this deputy; claimant reached maximum medical improvement on January 23, 2018.

Dr. Pick rated claimant as having a 14 percent permanent impairment to the left leg/lower extremity. (Ex. B, p. 2) According to Dr. Pick, there was a permanent loss of motion. (Ex. B, p. 2) Claimant had three fractures to the base of the 5th metatarsal, lateral malleolus, and medial malleolus. (Ex. B, p. 2) The orthopedist did not impose any work restrictions. (Ex. B, p. 2)

In her independent medical examination, Dr. Sassman rated claimant as having a 17 percent permanent impairment to the left leg/lower extremity. She was very detailed in her explanation about the use of the AMA Guides to the Evaluation of Permanent Impairment in computing her rating. Dr. Sassman included sensory loss in her calculation of permanent impairment. (Ex. 1, pp. 7-8) She also included loss of range of motion in calculating permanent impairment. (Ex. 1, pp. 7-8) The independent medical examiner factored in an impairment rating for the 5th metatarsal fracture. (Ex. 1, pp. 7-8) Additionally, Dr. Sassman imposed reasonable restrictions upon claimant's work. (Ex. 1, p. 8) The undersigned deputy notes Dr. Pick agreed in principle with Dr. Sassman; the work restrictions imposed were reasonable ones. (Ex. C, p. 4) Even though the restrictions were reasonable ones, Dr. Pick declined to adopt them. It seems only fitting; claimant should not use his left foot to operate foot controls or to walk on uneven terrain. This deputy is according more weight to the opinion of Dr. Sassman with respect to the calculation of the permanent impairment to the left leg/lower extremity than to the opinion of Dr. Pick. Therefore, it is the determination of the undersigned; claimant has a seventeen (17) percent permanent disability to the left leg as a result of his work injury on May 12, 2017.

Claimant's permanent partial disability shall be calculated according to Iowa Code section 85.34(2)(o). The subsection states:

> o. The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall equal the loss of a leg, and the compensation therefor shall be weekly compensation during two hundred twenty weeks.

The calculation is: 220 weeks X .17 percent equals 37.4 weeks of total permanent partial disability owed. Prior to the date of the hearing, claimant was paid 31

weeks of permanent partial disability benefits at the incorrect rate of $320.86. Defendants shall take credit for all benefits paid prior to the date of the hearing, including any overpayments paid.

Accrued benefits shall be paid in a lump sum, together with interest, as allowed by law. 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 payment of the independent medical evaluation and report provided by Dr. Sassman. Claimant is requesting payment pursuant to Iowa Code section 85.39. Dr. Sassman charged a total of $2,923.90. The report was $1,642.50. Radiographs were $126.40. The evaluation was $1,155.00. The examination occurred on November 8, 2017. The report was issued on April 11, 2018.

Section 85.39 permits an employee to be reimbursed for a subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

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, Dr. Sassman evaluated claimant prior to the date Dr. Pick determined a permanent disability. Dr. Jensen evaluated claimant after Dr. Sassman. Therefore, claimant is not entitled to recover the costs of the evaluation and for the radiographs taken.

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).

Defendants are liable for the cost of Dr. Sassman's report pursuant to Dart v. Young, 867 N.W.2d 839 (Iowa 2015). In Dart, the Court clarified Rule 4.33 of the Iowa Administrative Code. According to the Court, Rule 4.33 allows for the taxation of costs "incurred in the hearing."

A physician's report becomes a cost incurred in a hearing when it is used as evidence in lieu of the doctor's testimony. Block v. Clarinda Treatment Complex, File No. 5046672 (App. December 29, 2015).

Here, Dr. Sassman's report was used in lieu of the physician testifying at the arbitration hearing. The report is a recoverable cost pursuant to Rule 4.33 of the Iowa Administrative Code. Defendants are liable for the cost of the report in the amount of $1,642.50.

Defendants are also liable for the filing fee in the amount of $100.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant thirty-seven point four (37.4) weeks of permanent partial disability benefits commencing from January 23, 2018 and payable at the rate of three hundred-fourteen dollars and 00/100 ($314.00).

Accrued benefits, shall be paid in a lump sum together with interest, as detailed in the body of the decision.

Defendants shall take credit for all benefits paid prior to the date of the hearing, including any benefits paid in excess of the weekly benefit rate.

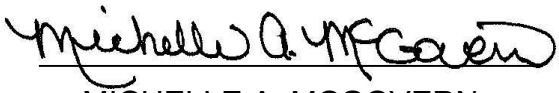
Defendants shall pay the costs of the independent medical report of Robin Sassman. M.D., MPH, in the amount of one thousand six hundred forty-two and 50/100 dollars ($1,642.50).

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 the 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 27th day of January, 2020.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

David Scott (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 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.