

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAYMOND AKERS, Claimant, vs. HEFFRON SERVICES, INC., Employer, WESCO INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 19001085.01 ARBITRATION DECISION Headnotes: 1803
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I. STATEMENT OF THE CASE.

Claimant Raymond Akers seeks workers' compensation benefits from the defendants, employer Heffron Services, Inc., and insurance carrier Wesco Insurance Company. The undersigned presided over an arbitration hearing on May 13, 2022, held using internet-based video by order of the Commissioner. Akers participated personally and through attorney Channing L. Dutton. Paul Heffron, owner and president of Heffron Services, participated as legal representative of Heffron Services. Both defendants participated by and through attorney Andrew T. Tice.

II. ISSUES.

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

- 1) What is the nature and extent of permanent disability caused by the alleged injury?
- 2) If Akers is entitled to workers' compensation, what is the weekly rate?
- 3) Is Akers entitled to taxation of the costs against the defendants?

III. STIPULATIONS.

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

- 1) An employer-employee relationship existed between Akers and Heffron Services at the time of the stipulated injury.
- 2) Akers sustained an injury on August 1, 2019, which arose out of and in the course of his employment with Heffron Services.
- 3) The alleged injury is a cause of temporary disability during a period of recovery, but Akers's entitlement to temporary or healing period benefits is no longer in dispute.
- 4) The alleged injury is a cause of permanent disability.
- 5) The commencement date for permanent partial disability (PPD) benefits, if any are awarded, is May 24, 2021.
- 6) At the time of the stipulated injury:
 - a) Akers's gross earnings were one thousand one hundred forty-four and 35/100 dollars (\$1,144.35) per week.
 - b) Akers was married.
- 7) Prior to hearing, the defendants paid to Akers fifty (50) weeks of compensation at the rate of seven hundred sixty-seven and 22/100 dollars (\$767.22) per week.

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

IV. FINDINGS OF FACT.

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 16;
- Claimant's Exhibits (Cl. Ex.) 1 through 4;

- Defendants' Exhibits (Def. Ex.) A¹ through G; and
- Hearing testimony by Akers and Heffron.

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

Akers was fifty years of age at the time of hearing. (Hrg. Tr. p. 12) Akers had lived in Lorimor, Iowa, about fifty miles southwest of Des Moines, for a little over a year as of the date of hearing. (Hrg. Tr. p. 12) Akers lived there with his wife, Elizabeth, their three minor children, and his grandson, Tatum, who the Akers adopted as their son after the work injury at the center of this case and before the hearing. (Hrg. Tr. p. 13)

Akers sustained a head injury as a child. (Hrg. Tr. p. 91; Jt. Ex. 1, p. 1; Def. Ex. F, p. 9) Family members told Akers he sustained a fractured skull. (Def. Ex. F, p. 9) There is an insufficient basis in the evidence from which to conclude the 1976 injury caused permanent disability.

Akers dropped out of school after the start of his tenth-grade year. (Hrg. Tr. p. 16) Despite completing nine grades, Akers was not at a ninth-grade level in his studies. (Hrg. Tr. p. 17) Akers has a learning disability that led to him being placed in a special education classroom. (Hrg. Tr. p. 17) He "can read enough to get by" but does not consider himself a "good reader." (Hrg. Tr. p. 19) As of the time of hearing, Akers had not obtained a GED or HiSET. (Hrg. Tr. p. 17)

When Akers was younger, he worked in restaurants such as McDonald's, Hardees, Burger King, and Ryan's Steakhouse in the kitchen and bussing tables. (Hrg. Tr. pp. 24–25; Def. Ex. F, p. 4) Akers worked for agricultural operations including pig farms and those with row crops. (Hrg. Tr. pp. 25–26; Def. Ex. F, p. 5)

Starting at age eighteen, Akers worked in construction. (Hrg. Tr. pp. 21–22; Def. Ex. F, p. 5) He worked in construction until 2007. (Hrg. Tr. p. 26; Def. Ex. F, pp. 5–6) While on layoff from construction work in 2007, Akers made the choice to enroll in classes at Des Moines Area Community College (DMACC) to obtain his commercial driver's license (CDL) so he could become an over-the-road truck driver. (Hrg. Tr. p. 26) He also earned endorsements for tankers, double trailers, and triple trailers. (Hrg. Tr. pp. 26–27)

In 2014, Akers sustained a head injury that caused vomiting and led him to obtain care at the emergency room (ER) of the Madison County Memorial Hospital in Winterset, Iowa. (Hrg. Tr. p. 92; Jt. Ex. 3, pp. 3–10; Def. Ex. F, p. 8) He was diagnosed with a concussion and discharged from the ER that same day. (Jt. Ex. 3, p. 8) Seven months later, at an appointment for neck pain at Iowa Ortho, a provider noted Akers

¹ The defendants moved to keep the record open to include, as part of Exhibit A, a report authored by Robert Jones, Ph.D., after an independent medical examination on May 9, 2022. Akers did not object. The undersigned granted the motion and ultimately admitted Exhibit A into evidence with the IME report included before closing the record.

complained of ringing in his ears and headaches. (Jt. Ex. 3, p. 16) Akers testified he experienced headaches before the work injury from which this case stemmed. (Hrg. Tr. pp. 93–94)

Akers pursued a claim based on injuries sustained on February 27, 2013, to his right shoulder, neck, and body as a whole. (Def. Ex. E) There is an insufficient basis in the evidence from which to conclude Akers sustained a head injury on the date in question. (Def. Ex. E) The weight of the evidence does not establish it is more likely than not he sustained a permanent disability that resulted from an injury to his head on the date in question.

Akers initiated contested case proceedings before the agency for alleged injuries on February 23, 2014, and July 15, 2014. (Def. Ex. G) Akers alleged permanent disability from the injuries and supported his claim with an independent medical examination (IME) report by Sunil Bansal, M.D., which included an impairment rating for the shoulder injury and permanent work restrictions for the right upper extremity. (Def. Ex. G, p. 1) The parties entered into a compromise settlement under Iowa Code section 85.35.3. (Ex. G)

The compromise settlement, which was approved by the agency, states:

On February 23, 2014, during the course of his employment with Dedicated Logistics, Inc., Claimant alleges that he was moving a pallet bar when he fell backwards, injuring his head and neck and re-injuring his right shoulder. Claimant presented to the emergency room where he underwent CT imaging of his head and neck, the latter revealing degenerative changes in the lower cervical spine. Claimant did not undergo any further treatment for this alleged injury.

On July 15, 2014, during the course of his employment with Dedicated Logistics, Inc., Claimant alleges that he re-injured his right shoulder when he was moving motors around and felt his right shoulder pop and start to burn. Claimant subsequently underwent a course of conservative care and eventually was diagnosed with a SLAP tear and underwent surgical repair on September 14, 2015.

Claimant underwent an IME with Dr. Sunil Bansal on October 16, 2015, wherein he opined that the injuries alleged herein each caused re-injury of Claimant's right shoulder SLAP tear, which originally occurred on February 27, 2013. Dr. Bansal assigned 4% whole body impairment with regard to Claimant's right shoulder but did not identify what portion of Claimant's impairment rating was attributable to the original injury or the injuries alleged herein. Dr. Bansal assigned provisional permanent restrictions of no lifting with the right arm.

(Def. Ex. G, p. 1)

The defendants denied Akers sustained any permanent disability resulting from the alleged work injuries on either of the dates in question. (Def. Ex. G, p. 2) Nonetheless, the parties settled for seventy-five thousand dollars. (Def. Ex. G, p. 2) The settlement documents do not contain any opinion from Dr. Bansal that can be construed as finding permanent disability resulting from the head injury of February 23, 2014. (Def. Ex. G) Nor is there any indication that Akers sought care for any alleged symptoms of the February 23, 2014 head injury, even if the record shows he informed Iowa Ortho he experienced ringing in his ears and headaches in September of 2014. There is an insufficient basis in the evidence from which to conclude the head injury caused Akers permanent disability.

Akers returned to work as a truck driver after the February 23, 2014 head injury. There is no indication the 2014 head injury impacted his ability to work as a truck driver or his medical certification for CDL purposes. The weight of the evidence shows Akers continued to work as a driver with a valid CDL after reaching MMI from the shoulder injury that ultimately necessitated surgery and formed the basis for Dr. Bansal's permanent impairment rating in 2015.

In 2015, Heffron Services hired Akers. (Hrg. Tr. p. 27) Heffron Services applies magnesium chloride to gravel roads across the state of Iowa to reduce dust. (Hrg. Tr. pp. 29, 33) Heffron Services needed a driver with an endorsement for liquid hauling, which Akers had. (Hrg. Tr. p. 29)

Akers drove tanker trucks that haul the magnesium chloride all over Iowa. (Hrg. Tr. pp. 29–31) The work at Heffron Services varied by the season. (Hrg. Tr. pp. 30–31) During the warmer busy season, he simultaneously drove the truck and monitored the application of the spray on the road. (Hrg. Tr. pp. 30–31) He would work forty hours weekly during the slow season and more during the busy season. (Hrg. Tr. p. 32)

In addition to driving, Akers worked on trucks. (Hrg. Tr. p. 35) Heffron Services ultimately promoted Akers to the job of operations manager. (Hrg. Tr. p. 35) He helped distribute information about assignments to other drivers. (Hrg. Tr. p. 35) His duties also included making sales calls to co-ops and other entities to help generate business. (Hrg. Tr. p. 37) He continued to drive for Heffron Services in the job of operations manager, but less often. (Hrg. Tr. p. 36)

Heffron Services provided drivers, including Akers, a credit card for business-related expenses while they were traveling and working for the company. (Hrg. Tr. p. 33) Akers would occasionally use the company credit card to pay for personal expenses. (Hrg. Tr. p. 34) According to Akers, Heffron Services would then deduct the amount of the payment from his next paycheck. (Hrg. Tr. p. 34)

Akers's grandson, Tatum, was born before the date of the stipulated work injury. (Hrg. Tr. p. 13) Tatum's father was shot and killed before he was born. (Hrg. Tr. p. 13) The State of Iowa removed Tatum from the care of his mother immediately after his birth. (Hrg. Tr. p. 13) The State placed him in the care of Akers and his wife when he was ready to leave the hospital and he has lived with Akers and his immediate family

ever since. (Hrg. Tr. p. 13) Heffron testified that he recalled Tatum coming home from the hospital to live with Akers and his immediate family at their home and that his wife made them a blanket for the baby. (Hrg. Tr. p. 137)

Tatum was living with Akers and his wife in their home on August 1, 2019. (Hrg. Tr. p. 14) After the work injury and before the hearing, Akers and his wife adopted Tatum. (Hrg. Tr. p. 14) At the time of hearing, they were Tatum's legal parents. (Hrg. Tr. p. 14)

In 2019, Akers's father-in-law was also living in their home. (Hrg. Tr. p. 14) He was unable to care for himself after sustaining a stroke. (Hrg. Tr. p. 14) Heffron testified at hearing that he recalled when the father-in-law was living with the Akers family. (Hrg. Tr. pp. 137–38) Akers and his wife had to help him with activities of daily living such as bathing him, cooking his meals, helping him use a toilet, etc. (Hrg. Tr. pp. 14–15)

The parties dispute whether Tatum and Akers's father-in-law living in the family home entitles him to additional exemptions for purposes of determining his workers' compensation rate. Neither party introduced Akers's tax returns for 2019 into evidence. (see Cl. Exs. 1–4; see also Def. Exs. A–G) On the one hand, Akers has the burden of proof, and his 2019 tax returns would help him meet that burden on the question of exemptions; on the other, if the tax returns Akers filed in 2019 show he did not claim his grandson or father-in-law, they would help the defendants. These dueling inferences combined with the other evidence to cause the undersigned to give little weight to the fact that neither party introduced Akers's 2019 tax returns into evidence as an exhibit.

Akers averred in his answers to interrogatories he claimed his grandson as a dependent in 2019 and he testified to this fact at hearing. (Def. Ex. D, p. 2; Hrg. Tr. p. 14) He also asserted in his answers to interrogatories he claimed his father-in-law as a dependent on his 2019 tax returns and gave hearing testimony of this fact. (Def. Ex. D, p. 2; Hrg. Tr. p. 16) Akers's testimony was credible on these facts. There is no evidence to the contrary in the record. Consequently, the weight of the evidence shows it is more likely than not Akers claimed his grandson on his 2019 tax returns as an exemption.

On August 1, 2019, Akers went to pick up a chemical load from a railroad yard. (Hrg. Tr. p. 39) After picking up the chemical, he returned to the shop at Heffron Services in Winterset to unload. (Hrg. Tr. pp. 40–41) Akers was talking on his cell phone with his wife at the time. (Hrg. Tr. p. 43) He got out of his truck and bent down to unscrew a cap to start pumping the chemical from his semi into a storage tank. (Hrg. Tr. pp. 41–42) Then, a sudden air-pressure explosion struck Akers. (Hrg. Tr. p. 39) The explosion generated such force that the cap Akers was removing from the trailer left a dent in a steel tank after striking it during the explosion. (Hrg. Tr. p. 137)

Akers remembers little about the blast or its aftermath. (Hrg. Tr. p. 43) He remembers feeling pain in his thumbs and walking into the office. (Hrg. Tr. p. 38) However, he has no memory of speaking to his wife on the phone after it occurred. (Hrg. Tr. p. 43) Akers received care at the Madison County Memorial Hospital ER, where he complained of dizziness, nausea, and bilateral thumb pain. (Jt. Ex. 7, pp. 20,

27) The ER referred Akers to Jonathan Suddarth, D.O., for neurologic checks, nausea control, and continued assessment of his head injury, who led his subsequent care. (Jt. Ex. 7, p. 22)

A computerized tomography (CT) scan showed no acute intracranial abnormality. (Jt. Ex. 7, p. 23) An x-ray of Akers's right hand showed chronic right fifth metacarpal deformity without acute fracture or dislocation. (Jt. Ex. 7, p. 24) An x-ray of his left hand showed no fracture or dislocation. (Jt. Ex. 7, p. 25)

On August 6, 2019, Dr. Suddarth noted ongoing pain, swelling and stiffness in both thumbs and recommended occupational therapy to help increase his range of motion. (Jt. Ex. 8, p. 30) Dr. Suddarth noted Akers was still "a bit forgetful and has some balance difficulty," which left him unable to drive a semi-truck. (Jt. Ex. 8, p. 30) Dr. Suddarth prescribed physical therapy to help with his balance and dizziness. (Jt. Ex. 8, p. 30) He further noted:

We discussed how the brain will need time to resolve on its own. I recommend he follow-up after finishing his occupational therapy and we will revisit his ACE concussion evaluation sheet prior to returning to unrestricted duties. At this time I do not feel that he is safe operating machinery or doing any ladder work.

(Jt. Ex. 8, p. 31)

Dr. Suddarth also noted Akers complained of tinnitus. (Jt. Ex. 8, p. 30) He opined the blast caused it and opined there was a nerve component to it and there may also be a percussion component with some edema in the ear hearing apparatus. (Jt. Ex. 8, p. 30) Dr. Suddarth felt Akers's tinnitus would resolve with time. (Jt. Ex. 8, p. 30)

Sarah Feerhusen, O.T., provided care and noted on September 10, 2019, that his "cognitive functioning seems to be improving significantly. However, he continues to have thumb pain and is avoiding carrying/lifting." (Jt. Ex. 8, p. 34) Because conservative treatment was not having the desired result, she recommended a referral to Teri Formanek, M.D. (Jt. Ex. 8, p. 34)

Akers followed up with Dr. Suddarth the next day complaining of nystagmus, ear-ringing, dizziness, and a persistent headache that felt like a hangover. (Jt. Ex. 8, pp. 35–36) Dr. Suddarth noted progress with his speech, perception, and pace of assimilation of information, but also found Akers had not returned to his baseline in these areas. (Jt. Ex. 8, pp. 35–36) He prescribed continuing occupational and physical therapy and kept Akers off work. (Jt. Ex. 8, p. 36)

On September 20, 2019, Akers saw Simon Wright, M.D., Ph.D., at Iowa ENT Center for his tinnitus. (Jt. Ex. 9, p. 88) Dr. Wright noted Akers had experienced "continuous bilateral loud ringing of the ears" since the blast. (Jt. Ex. 9, p. 88) Akers further described his symptoms to include, "The right ear will pop and crackle when he

swallows and eats.” (Jt. Ex. 9, p. 88) After an examination and tympanometry and comprehensive audiogram testing, Dr. Wright noted:

Akers has bilateral high-frequency sensorineural hearing loss with notches at 6000 Hz. I described the pathophysiology of tinnitus and explained that his ringing of the ears is consistent with the level of hearing loss that he is experiencing. I reviewed the findings with the patient. I explained that his r[ing]ing is most likely secondary to his blast injury. I explained how a blast injury or acoustic trauma can lead to ringing of the ears. [Although] the patient . . . certainly had significant noise exposure prior to this event, the severity of the event combined with the new onset of tinnitus suggests a cause of that relationship. Unfortunately, we do not have a[n] earlier preinjury hearing test to allow for a direct comparison. Nonetheless, the history and clinical presentation is convincing. Unfortunately, we do not have a medical treatment [to] offer him. We are hopeful that some of his [symptoms] will diminish over time. We did recommend that he follow up in 3 months for repeat audiometry. In the meantime, vigilant protection of the hearing is important.

(Jt. Ex. 9, p. 90)

On October 7, 2019, Akers saw Dr. Formanek for the laceration, pain, and swelling in his right thumb that was caused by the blast at work. (Jt. Ex. 10, p. 94) Dr. Formanek examined Akers and found tenderness at the carpometacarpal (CMC) joint of the right thumb, reduced mobility, and crepitus in the joint. (Jt. Ex. 10, p. 94) He also observed in and around the metacarpophalangeal (MP) joint pain and gross instability of the ulnar collateral ligament (UCL). (Jt. Ex. 10, p. 94)

Akers saw Dr. Suddarth again on October 11, 2019. (Jt. Ex. 8, p. 37) Dr. Suddarth noted both Akers and his physical therapist “admit his dizziness is showing slow improvement” and that bright lights at the grocery store and the noise at a restaurant made it worse. (Jt. Ex. 8, p. 37) Dr. Suddarth performed testing that showed Akers continued to experience vertigo and a deficit in balance confidence. (Jt. Ex. 8, p. 37) Akers also still had an ongoing headache and nausea, but no vomiting. (Jt. Ex. 8, p. 37) Dr. Suddarth further noted:

[Akers] is showing improvement. It is taking more and more effort to induce his nystagmus per physical therapy. I see that on my exam as well.

His pace of speech has improved back to baseline. He no longer focuses on every word to get it out clearly.

He continues to be dizzy when [he] turns [his] head. He continues to be intolerant to pressure changes such as riding in a vehicle and somebody [rolls] window down.

He has full range of motion of the eyes. Extraocular muscles intact. Nystagmus is easily induced but he is able to tolerate more before getting so dizzy he has to close his eyes.

He has made obvious progress since his initial visit post injury. His speech is faster. His perception is better. His pace of assimilation of information is faster. It is not yet his baseline.

(Jt. Ex. 8, p. 38)

Dr. Suddarth recommended continuing physical therapy because of the “slow and steady progress” Akers was making. (Jt. Ex. 8, p. 38) He also opined Akers was “by no means ready to climb back into the driver seat of a semi.” (Jt. Ex. 8, p. 38) Dr. Suddarth also noted Akers would be restarting occupational therapy. (Jt. Ex. 8, p. 38)

Dr. Formanek saw Akers for a follow-up appointment after reviewing magnetic resonance imaging (MRI) of his right thumb. (Jt. Ex. 10, p. 96) Dr. Formanek diagnosed Akers with a sprain of the UCL with no displacement based on the MRI. (Jt. Ex. 10, p. 96; Jt. Ex. 11, p. 105) Dr. Formanek prescribed a short arm cast for five weeks with limited forces through his right hand. (Jt. Ex. 10, p. 96) However, Akers returned to see Dr. Formanek the next day because he experienced swelling and decolorization in his fingers. (Jt. Ex. 10, p. 98) Dr. Formanek removed the problematic cast and tried a different one. (Jt. Ex. 10, p. 98)

In a letter dated October 8, 2019, Heffron Services communicated to Akers that he had been demoted from the position of foreman to driver because he improperly used a company credit card for personal expenses, excessive personal cell phone usage during work hours and the dangerous conditions it caused, and failure to perform his job satisfactorily and as directed. (Def. Ex. C, p. 1; Hrg. Tr. p. 127) Heffron signed the letter. (Def. Ex. C, p. 1) This letter followed previous incidents in which Akers had used the company credit card for personal expenses and reimbursed Heffron Services through paycheck withholdings. (Hrg. Tr. pp. 127—29)

On November 13, 2019, Dr. Suddarth saw Akers again and noted continued slow improvement in his symptoms through physical therapy. (Jt. Ex. 8, p. 39) Nonetheless, Akers continued to experience a daily headache. (Jt. Ex. 8, p. 39) Dr. Suddarth noted Akers “continue[d] to be off work. This [ha]s been a great deal of stress for him as there are 7 people in the household and he is the primary [earner].” (Jt. Ex. 8, p. 39)

Akers returned to Dr. Formanek for a follow-up exam on November 18, 2019. (Jt. Ex. 10, p. 99) Akers personally removed the cast the day before because it was bothering him. (Jt. Ex. 10, p. 99) Dr. Formanek noted Akers still had some swelling around the MP joint and reduced mobility on flexion and extension of the MP joint. (Jt. Ex. 10, p. 99) Dr. Formanek instructed Akers to avoid impact activities for another month and to undergo physical therapy. (Jt. Ex. 10, p. 99)

Dr. Formanek saw Akers on December 11, 2019. (Jt. Ex. 10, p. 100) Dr. Formanek noted stiffness at the MP joint of the right thumb and Akers complained of pain at the base. (Jt. Ex. 10, p. 100) Dr. Formanek recorded thirty-five degrees of MP flexion and full extension. (Jt. Ex. 10, p. 100) Dr. Formanek further noted tenderness and some enlargement at the CMC joint, which also had a positive grind test. (Jt. Ex. 10, p. 100)

Akers next saw Dr. Suddarth on December 13, 2019, reporting persistent dizziness and daily headache. (Jt. Ex. 8, p. 41) Akers was continuing to make slow and persistent gains through physical therapy. (Jt. Ex. 8, p. 41) Dr. Suddarth noted Akers had been driving his personal vehicle “and is able to do that when he focuses on the road ahead. He states he did have to pull over and allow the dizziness to abate after taking a cloverleaf exit ramp in the morning recently.” (Jt. Ex. 8, p. 41) On Akers’s ability to return to work, Dr. Suddarth stated:

He is approaching the ability to return to work. The biggest concern is that he drives a spray truck putting chemical on gravel roads for dust control. This involves booms on both sides of the truck and constantly looking out the left and right windows to make sure he is clearing signs and mailboxes. This will be nonstop rotational head motion. His other job is climbing up and down the back of tanker trucks to open and close the filling doors. Vertical motion is by far his biggest trigger for dizziness.

(Jt. Ex. 8, p. 41) “At this time, I do not feel he is ready to climb back in a semi-. The risk is too great to himself and others with[] amount of vertical and rotational head motion required.” (Jt. Ex. 8, p. 43)

Akers returned to see Dr. Wright on December 20, 2019, for repeat audiology testing. (Jt. Ex. 9, p. 91) After conducting tympanometry and comprehensive audiogram testing, Dr. Wright noted Akers had “a mild conductive hearing loss of the right ear with symmetric bilateral high frequency sensorineural hearing loss.” (Jt. Ex. 9, p. 92) He opined there was not “a clear-cut explanation for his conductive loss” and it “may be related to the explo[s]ion and acoustic trauma.” (Jt. Ex. 9, p. 93) Dr. Wright further opined no care was likely to eliminate his symptoms. (Jt. Ex. 9, p. 93)

Akers followed up again with Dr. Suddarth on January 15, 2020. (Jt. Ex. 8, p. 44) Dr. Suddarth noted the “excellent progress” Akers had made with therapy and that he needed more. (Jt. Ex. 8, p. 46) At the time, the defendants would not authorize additional physical therapy for Akers and they were discussing alternative providers for additional therapy. (Jt. Ex. 8, pp. 44–46) On the possibility of Akers returning to his job driving trucks at Heffron Services, Dr. Suddarth opined:

I am concerned about his ultimate ability to return to professional driving in his semitruck with his persisting dizziness. Ray ultimately would like to return to his prior occupation but acknowledges that ultimately may not be the case. We will see if any other avenues are available for therapy and full recovery before he fully considers a career change.

(Jt. Ex. 8, p. 46)

On April 15, 2020, Akers saw Dr. Formanek for a follow-up regarding his injured right thumb. (Jt. Ex. 10, p. 101) Akers was still experiencing stiffness and pain, primarily in the MP joint. (Jt. Ex. 10, p. 101) Dr. Formanek noted the MP joint was tender to palpation over the joint capsule both on the dorsal medial and lateral side and forty degrees of MP flexion and full extension of the right thumb. (Jt. Ex. 10, p. 101) Dr. Formanek also observed DIP flexion of fifty degrees and normal extension. (Jt. Ex. 10, p. 101)

Moreover, Dr. Formanek opined “the residual symptoms are related to the stiffness that [ha]s developed as a result of the injury and the fact that he had some underlying arthritis which was not really symptomatic. (Jt. Ex. 10, p. 101) Dr. Formanek opined Akers was at MMI for his right thumb and required no permanent work restrictions due to the work injury. (Jt. Ex. 10, p. 101) Dr. Formanek did not opine as to what, if any, permanent functional disability Akers sustained. (Jt. Ex. 10, p. 101)

Akers saw Beth Triebel, O.D., on April 10, 2020, for an examination regarding his sight issues following the concussion he sustained during the blast. (Jt. Ex. 11, p. 106) Dr. Triebel found Akers had postconcussional syndrome, regular bilateral astigmatism, presbyopia, puckering of the macula in his left eye, glare sensitivity, and convergence insufficiency. (Jt. Ex. 12, p. 111) Akers showed “constriction of visual fields with all colors of white, blue, red, and green, more in his left eye than his right” and “an enlarged blind spot of the left eye.” (Jt. Ex. 12, p. 113) Dr. Triebel prescribed Syntonic light therapy three to five days per week for twenty minutes each session to try to open the fields. (Jt. Ex. 12, p. 113)

The force of the blast caused Akers’s eyes to align so they face outwards, causing him double vision. (Hrg. Tr. p. 44) Dr. Triebel prescribed prism glasses to help mitigate his double vision and headaches. (Hrg. Tr. pp. 44–45) He goes to regular check-ups with Dr. Triebel for his glasses and vision. (Hrg. Tr. p. 46)

On April 23, 2020, Akers saw Dr. Suddarth, who noted his thought-processing speed and speech were back to baseline but he did not perform a neurological exam because Akers had just finished physical therapy and was still experiencing dizziness from his work there. (Jt. Ex. 8, pp. 47–49) On Akers’s ability to return to work, Dr. Suddarth opined:

At this point I do not feel he is ready to return to a truck. The qualifications that accompany his return to work sheets specifically state that he must be able to drive a . . . manual [transmission] semitruck, climb on cars, unload cars, repair semitrucks, lift 50 to 75 pounds occasionally and be able to drive a semitruck 8 hours/day. He is not safe to be climbing to heights. He is also not safe to be doing rapid head movements left or right such as checking mirrors or over his shoulder. Rapid movements in his field-of-view such as fence posts and telephone poles will quickly reproduce his symptoms. He is not ready to return to that level of activity yet.

However, he continues to make slow and steady gains with his physical therapy. He has been evaluated locally as well as neuro ophthalmology and [O]n [W]ith [L]ife. Coordinated effort to his rehab program between the 3 are continuing to show improvements. I have updated his physical therapy requests and hope[] to continue working with him again [on] improvements that we will get him back into his professional driving role. He hopes to return to that role ultimately.

(Jt. Ex. 8, p. 49)

Dr. Suddarth examined Akers again on May 28, 2020. (Jt. Ex. 8, p. 50) Dr. Suddarth again noted slow and steady progress in physical therapy but that they had become more incremental than in the past and had not “translated to functional gains with respect to his primary occupation of a semitruck driver” even though Akers “is motivated to continue working toward getting back into a truck again.” (Jt. Ex. 8, p. 52) He also made note that Akers was “concerned” and acknowledged he had not reached the point where “he would be safe to drive a semi.” (Jt. Ex. 8, p. 52) Dr. Suddarth recorded his support for continued physical therapy but also noted his concern that the diminishing returns might signal that Akers is nearing a plateau in his recovery. (Jt. Ex. 8, p. 53)

Dr. Adelman issued an IME report dated June 4, 2020. (Jt. Ex. 13, p. 131) He opined that Akers sustained a cerebral concussion with mild posttraumatic headache. (Jt. Ex. 13, p. 133) He found Akers’s disequilibrium with nausea to be consistent with posttraumatic vertigo. (Jt. Ex. 13, p. 133) Dr. Adelman further opined that Akers’s symptoms at the time of the IME were caused by the explosion at work. (Jt. Ex. 13, p. 133) He further asserted Akers could climb into a truck but should avoid situations that require rapid changes of head or body position. (Jt. Ex. 13, p. 133) With respect to driving a semi-truck, Dr. Adelman stated:

Mr. Akers does not feel comfortable returning to drive as an over the road truck driver, as he feels he may place others at risk. Given this statement, I would not clear him to return to his previous work. However, I believe he can return to work beginning at light duty, i.e. no lifting greater than 20 pounds and avoiding rapid changes of head or body position.

. . . As Mr. Akers is able to drive his private vehicle and he tells us that he is slowly improving I would hope at some point he would be able to return to work as a foreman/truck driver. In addition he would like to keep his CDL license.

(Jt. Ex. 13, p. 133)

Akers next visited Dr. Suddarth on July 2, 2020, and shared he had good days and bad days with his symptoms. (Jt. Ex. 8, p. 54) He continued to experience headaches and dizziness with significant head movements, loud noises, background noise, and visual overstimulation. (Jt. Ex. 8, p. 55) Dr. Suddarth opined that, “as long as

he continues making gains I will completely support his efforts to move forward and attempt to get back into his professional driving role” but that they would have to consider other options if he stopped making gains. (Jt. Ex. 8, p. 56)

On August 4, 2020, Akers followed up with Dr. Suddarth. (Jt. Ex. 8, p. 57) Akers informed Dr. Suddarth that his prism glasses helped with his headaches, which he continued to experience daily. (Jt. Ex. 8, p. 57) Dr. Suddarth noted Akers had “work[ed] with physical therapy and occupational therapy religiously.” (Jt. Ex. 8, p. 57) “His most recent physical therapy assessment still show[ed] improvement but very slow gains at this point.” (Jt. Ex. 8, p. 59)

Dr. Suddarth referred Akers to the Iowa Ear Center, where he saw Trisha Hittenmiller on October 14, 2020. (Jt. Ex. 15, p. 141) Hittenmiller found it impossible to determine if any of Akers’s hearing loss was attributable to the explosion without testing from within five years before the work injury. (Jt. Ex. 15, p. 141) She further opined she reassured Akers that he was “doing all the right things” and he should continue with therapy. (Jt. Ex. 15, p. 141) Hittenmiller also stated that the recovery time and even if Akers will make a complete recovery “is always unknown in these instances.” (Jt. Ex. 15, p. 142)

Akers saw Hittenmiller again on November 13, 2020, and she noted his chief complaint was “intermittent dizziness with spinning and an off-balance sensation that occurs several times per day and lasts for minutes.” (Jt. Ex. 15, p. 150) He shared that he experienced such dizziness on a daily basis following the blast injury at Heffron Services. (Jt. Ex. 15, p. 150) “Aggravating factors include positional changes, particularly quick head movements to the left and right, loud noises, and busy environmental stimuli such as grocery stores and crowds. Relieving factors include limiting positional movements.” (Jt. Ex. 15, p. 150)

After Akers saw Dr. Suddarth about some forms he needed filled out and fell ill with what may have been COVID-19, he had another follow-up appointment on November 17, 2020. (Jt. Ex. 8, pp. 60–61) Akers continued to complain of tinnitus and dizziness. (Jt. Ex. 8, p. 64) He also noted that Akers had seen Dr. Carfrae regarding balance. (Jt. Ex. 8, p. 64)

Dr. Suddarth noted more slow and steady gains through physical therapy on December 18, 2020. (Jt. Ex. 8, p. 65) Akers shared that he continued to experience ringing in his ears, dizziness, nausea, and troubles with balance. (Jt. Ex. 8, pp. 65, 68) Dr. Suddarth recommended Akers continue with physical therapy because he continued to make gains. (Jt. Ex. 8, p. 69)

Akers followed up with Dr. Suddarth on January 20, 2021, and again showed slow and steady gains via physical therapy. (Jt. Ex. 8, p. 70) Dr. Suddarth noted:

He feels he is making slow but steady gains with the pattern wall. Initially he was unable to look at the wall at all but now he is able to focus on some of the darker areas of it while therapy is getting him to work on some

of the brighter areas. This is still a struggle for him. He continues to have difficulties with loud noises and sudden movements.

(Jt. Ex. 8, p. 70) Akers also complained of continued dizziness with bright patterns and rapid head movements and headaches exacerbated by loud noises and bright lights.

(Jt. Ex. 8, p. 74) Dr. Suddarth concluded Akers was making objective and subjective progress with physical therapy and there was a clear plan moving forward with Dr. Carfrae. (Jt. Ex. 8, pp. 74–75)

On March 3, 2021, Akers saw Dr. Suddarth for a follow-up exam. (Jt. Ex. 8, p. 76) Dr. Suddarth noted continued “small incremental gains in his therapies” that were “not translating into an ability to return to driving at the professional level,” which was his goal. (Jt. Ex. 8, p. 76) He further noted, “We had discussions today regarding consideration for alternative employment. I do think he would likely be able to do some types of heavy machinery work,” including operating bulldozers, skid loaders, or other machinery in open spaces. (Jt. Ex. 8, p. 77)

We also discussed that his current DOT medical clearance for his CDL will be coming due in July. In his current state, he would not be able to pass the requirements.

We discussed that there may come a point in time when his symptoms have resolved to the point that he can return to the occupation but that remains to be seen and is very unpredictable.

(Jt. Ex. 8, p. 77)

Dr. Suddarth saw Akers for an appointment on April 21, 2021, and noted:

PT continues to state that he is making gains but the[y are] small and incremental and have not translated to gains that would let him resume his occupation as a professional driver. He continues to have significant dizziness with looking left or right or moving his head. He also has significant headache with loud noises or multiple stimuli.

(Jt. Ex. 8, p. 79)

Dr. Suddarth opined Akers was “not at a point where he would be safe to return to driving over the road semi[s]” and was not a good candidate for work in “extremely loud environments or operating heavy machinery” because “excessive noise and movement/stimuli [were] still quite problematic for him.” (Jt. Ex. 8, p. 81) Dr. Suddarth discussed with Akers the possibility of training for work in a different field while his brain continued the healing process. (Jt. Ex. 8, p. 81)

After a second IME of Akers, Dr. Adelman issued a second IME report, dated May 24, 2021, in which he noted:

Currently when seen, [Akers] believes his symptoms have remained essentially unchanged over the last 10 months. He still has a dull aching headache for which [he [ha]s been placed on nortriptyline. He also has sensation of disequilibrium with nausea particularly when exposed to loud noises or changes in head or body position. He apparently did have an MRI of the brain and has been receiving balance exercises through physical therapy. His CDL license has been [revoked]. He does drive his car to some degree and tells me he spends his days helping around the house.

(Jt. Ex. 13, p. 136)

Dr. Adelman opined that Akers had reached MMI for his traumatic brain injury and that he had not sustained a permanent neurologic impairment. (Jt. Ex. 13, pp. 137–38) With respect to a return to over-the-road trucking, Dr. Adelman opined Akers's subjective complaints would prevent him from doing so. (Jt. Ex. 13, p. 137) Dr. Adelman further stated he believed Akers could be “employed in an occupation where he is not climbing ladders or driving long distances.” (Jt. Ex. 13, p. 137) However, Dr. Adelman opined Akers did not require permanent work restrictions relating to moving or lifting based on the weight of objects. (Jt. Ex. 13, p. 137)

Akers telephoned Heffron after receiving Dr. Adelman's report. (Hrg. Tr. p. 131) He informed Heffron he had received the report and asked him if Heffron Services had any light-duty work available within his work restrictions. (Hrg. Tr. p. 131). Heffron informed him that Heffron Services did not have any light-duty work available. (Hrg. Tr. p. 131) Heffron also asked Akers if he had his medical card for his CDL and after Akers told him that he did not, Heffron informed Akers it would be impossible for Heffron Services to have him do any driving without the medical certification to drive using a CDL. (Hrg. Tr. p. 131) Heffron testified at hearing that if Akers did not have functional limitations that prevented him from getting medical certification for a CDL, he would be working for Heffron Services. (Hrg. Tr. p. 132)

Akers brought Dr. Adelman's IME report for Dr. Suddarth to review on June 9, 2021. (Jt. Ex. 8, pp. 82, 86) Dr. Suddarth reviewed the IME report. (Jt. Ex. 8, p. 86) He discussed with Akers that he may need assistive technology and accommodations such as noise-cancelling headphones or earbuds, to return to full-duty work. (Jt. Ex. 8, p. 87) He also opined that he felt Akers was “able to be employed but being employed as a professional driver [was] not likely to be a part of his near future.” (Jt. Ex. 8, p. 87) There are no medical records or opinions from Dr. Suddarth after those relating to the June 9, 2021 examination.

Claimant's counsel arranged for Akers to undergo an IME by Sunil Bansal, M.D. (Cl. Ex. 1, pp. 155–56) Dr. Bansal conducted an in-person examination of Akers, reviewed medical records, and then issued an IME report with his opinions. (Cl. Ex. 1, pp. 157–77) Dr. Bansal had an accurate understanding of Akers's job duties at Heffron Services and the current status of his CDL. (Cl. Ex. 1, pp. 171–72)

Dr. Bansal measured Akers's grip strength with both hands using a dynamometer. (Cl. Ex. 1, p. 173) He noted tenderness to palpation over the UCL of the right thumb. (Cl. Ex. 1, p. 173) Dr. Bansal measured the radial abduction of the first finger at the MCP joint at forty degrees. (CL. Ex. 1, p. 173)

Dr. Bansal diagnosed Akers with a right thumb laceration and UCL strain and used Table 16-8a of the Fifth Edition of American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment* ("Guides") to assign Akers a permanent functional impairment of two percent to the right thumb (which is equal to a one percent impairment to the right hand or one percent impairment to the right upper extremity). (Cl. Ex. 1, p. 174) No other doctor addressed Akers's permanent disability to the right thumb or hand using the Guides as Dr. Bansal did; therefore, his opinion on permanent disability to the right thumb is persuasive and is adopted.

Dr. Bansal also addressed the symptoms Akers has experienced since being caught in the blast at Heffron Services and sustaining a traumatic injury to his head. Under the header "HEAD/NEUROLOGIC," Dr. Bansal used Tables 13-5 and 13-6 of the Guides to place Akers in Class I and assigned a rating of seven percent impairment to the whole person. However, because Dr. Jones's specialty is in neuropsychology and his expert opinion is based on more robust testing that occurred closer to the date of hearing, his finding of no cognitive impairment is found more credible, as discussed below.

Dr. Bansal noted he found Akers to have objective signs of vertigo in the form of positive videonystagmography (VNG). (Cl. Ex. 1, p. 174) He used Table 11-4 to find Akers falls within Class II for his vertigo. (Cl. Ex. 1, p. 174) Dr. Bansal assigned Akers a five percent permanent functional impairment to the whole body for his vertigo because it interferes with certain activities when it occurs. (Cl. Ex. 1, p. 174)

Dr. Bansal quoted Table 13-3 of the Guides in finding that Akers's headaches "can be best described as an episodic loss of consciousness or awareness secondary to [his] intense headaches." (Cl. Ex. 1, p. 174) He used this categorization to place him in the category for a Class I impairment because while Akers has a regular dull headache, it can worsen in episodes that create risk when he is driving. (Cl. Ex. 1, p. 174) Based on this and the "analogous" example on page 312, under section 13-5, he assigned Akers a four percent functional impairment to the whole body because of the headaches caused by the stipulated work injury.

Defense counsel arranged for Akers to undergo an IME in the form of a neuropsychological assessment with Robert Jones, Ph.D., on May 9, 2022, at the University of Iowa Hospitals and Clinics. (Def. Ex. A, p. 1) Dr. Jones performed an in-person evaluation and records review before issuing an IME report with his impressions dated May 20, 2022. (Def. Ex. A, pp. 1–8) After a discussion with Akers, Dr. Jones noted that since the work injury,

Mr. Akers has reported cognitive, physical, and behavioral changes. Cognitively, he endorsed difficulties with memory, attention/concentration,

word-finding, and executive functioning. Physically, he noted problems with nausea, dizziness/vertigo, sensitivity to light, poor vision, ringing in ears, imbalance (no falls), and constant headaches.

(Def. Ex. A, p. 1)

During the examination, Dr. Jones observed, “Throughout the evaluation he complained of a headache, nausea, and dizziness. Mood was neutral with congruent affect. Observed effort was fair.” (Def. Ex. A, p. 5) Akers participated in multiple clinical assessments. (Def. Ex. A, pp. 5–6) He “performed within normal limits on all direct and embedded performance and symptom validity tests.” (Def. Ex. A, p. 6) The results of these assessment formed Dr. Jones’s opinion that:

There is no evidence of cognitive dysfunction or emotional difficulties related to the August 1, 2019 accident. Although his self-report and contemporaneous records suggest a scenario that is consistent with a concussion, there do not appear to be any residual deficits from a neuropsychological perspective. He has a number of other symptoms that have been attributed to the accident, for example dizziness and headaches, but we would defer to other experts to comment on these possible conditions. Relevant to this profile, we see no reason for permanent work restrictions from a purely cognitive perspective.

Mr. Akers’ profile indicates that his cognitive functioning was within normal limits and consistent with expectations across all domains of complex cognition. Given his estimated baseline, he had broadly normal performances across measures of intellectual abilities, verbal memory, visual memory, visuospatial abilities, visuoconstructional praxis, visual naming, and executive functioning. There was some variability and weaknesses in processing speed, attention, and language abilities (particularly reading, in the context of reported pre-existing dyslexia). Variability in his neuropsychological profile can be fully explained by pre-existing baseline functioning (i.e., reported history of learning difficulties). Furthermore, Mr. Akers performed in the normal, expected range on performance validity and symptom validity testing, with no indication or dissimulation or symptom over-reporting.

(Def. Ex. A, p. 7)

The findings of Dr. Jones are in line with those of Dr. Suddarth. Aided by Akers’s work in physical and occupational therapy, he made improvements in his cognitive function. He was able to make it back to his pre-injury baseline. Consequently, the findings of Dr. Jones with respect to Akers’s cognitive functioning are adopted.

Akers’s primary treating physician for the work injury has been Dr. Suddarth. (Hrg. Tr. p. 51) Dr. Suddarth has refused to provide Akers with a medical certificate allowing him to use his CDL and has also advised Akers that he needs to think about a

career change because the effects of the explosion will prevent him from returning to work as a driver due to the safety risk he would pose in such a job. (Hrg. Tr. p. 52) As Akers credibly described the risk during his hearing testimony: if he gets dizzy while driving a tractor-trailer on the road, he could kill someone. (Hrg. Tr. p. 53)

The explosion caused trauma to Akers's eyes. (Hrg. Tr. p. 44) The pupils of his eyes are now angled outward. (Hrg. Tr. p. 44) This has hurt his eyesight to the point he requires eyeglasses with prisms to see clearly. (Hrg. Tr. pp. 44–45) Akers did not need eyeglasses to help see clearly before the work injury. (Hrg. Tr. pp. 44–45) At the time of hearing, he wore eyeglasses that allow him to see "normally," without double vision. (Hrg. Tr. p. 45)

Increased sensitivity to light is another effect of the blast. (Hrg. Tr. p. 47) Certain types of light (e.g., fluorescent and sunlight) give Akers a headache. (Hrg. Tr. pp. 47–48) Consequently, he participated in the hearing from a conference room with the overhead lights turned off and the curtains drawn. (Hrg. Tr. pp. 47–48) Akers also wears a baseball cap to help reduce his exposure to light. (Hrg. Tr. p. 47)

Akers has also experienced an increased sensitivity to colors. (Hrg. Tr. pp. 49–50) He uses the term "loud" to describe color combinations that cause him to get dizzy and lose his bearings. (Hrg. Tr. pp. 49–50) Claimant's counsel and Dr. Adelman have carpet in their offices that are "loud" enough to cause Akers issues like dizziness and nausea. (Hrg. Tr. p. 50)

The explosion also affected Akers's hearing. (Hrg. Tr. p. 46) Before it, Akers did not experience ringing in his ears. (Hrg. Tr. p. 46) After the explosion and at the time of hearing, he experienced a constant ringing such that he must sleep with a fan and television on to drown out the ringing. (Hrg. Tr. p. 46)

Dr. Bansal's opinion on the permanent disability Akers has sustained due to vertigo is in line with the bulk of the evidence regarding Akers's post-blast symptoms and is adopted. Dr. Suddarth did not opine on permanent disability, but Dr. Bansal's understanding of Akers's dizziness or vertigo is in line with Dr. Suddarth's records. Dr. Adelman opined Akers could not return to work that included the duties of driving long distances or climbing ladders and that he could not return to driving a semi-truck. As discussed below, Dr. Jones expressly categorized Akers's dizziness or vertigo as a physical issue and deferred to other experts on it. For these reasons, the weight of the evidence shows Akers has sustained a five percent permanent functional impairment to his whole body from the vertigo caused by the blast.

With respect to Akers's headaches, the defendants argue that Akers suffered from headaches before the blast, but there is an insufficient basis in the record from which to conclude he experienced headaches of the type or severity that he has regularly experienced after the blast. Dr. Bansal's understanding of Akers's headaches is in line with what is described elsewhere in the medical records and in Akers's hearing testimony. There is no doctor who disputes it. For these reasons, the weight of the evidence shows Akers has sustained a four percent impairment to the whole person

caused by the headaches resulting from the stipulated work injury, as opined by Dr. Bansal.

At the time of hearing, Akers worked for Diamond J Seamless Gutters as a helper during installation. (Hrg. Tr. p. 59) He works on the ground, getting parts and tools for other workers during installations. (Hrg. Tr. pp. 59–60) Akers also drives for the business as needed. (Hrg. Tr. p. 60) The work is intermittent, based on the jobs the company has. (Hrg. Tr. pp. 60–61)

The defendants question Akers's desire to work, pointing to his lack of a job search for over two years between the injury and date of hearing. However, during the bulk of this time, Akers was, as Dr. Suddarth put it, "religiously" attending physical and occupational therapy in an attempt to get better and return to work as a driver for Heffron Services. As detailed above, the medical records make frequent reference to Akers wanting to get back to work driving a truck, in part because he had to support his family.

Further, Akers was under work restrictions that prevented him from returning to work at Heffron Services, where he was still employed. It was not until May of 2021, when Heffron informed Akers that he had no light duty work for him and he would not be able to return as a driver without first obtaining medical certification for his CDL, that Akers believed he no longer had a job waiting for him after he rehabilitated from his injuries. He ultimately obtained the job working at Diamond J, which he held at the time of hearing. The weight of the evidence establishes Akers was motivated to return to work at Heffron Services and worked hard to make that goal a reality. Even if Akers was ultimately unsuccessful and is medically incapable of returning to work as a driver at Heffron Services, that does not mean that he did not want to work during the time period in question.

V. CONCLUSIONS OF LAW.

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

A. Rate.

The parties stipulated that at the time of the work injury, Akers had gross earnings of one thousand one hundred forty-four and 35/100 dollars (\$1,144.35) per week and was married. The parties agree Akers is entitled to at least five exemptions. But Akers contends he is entitled to two more or seven total exemptions and the defendants disagree.

Specifically, the parties dispute whether his grandson, who was living with him at the time of the injury and he ultimately adopted, and father-in-law, who was also living with him at the time of the injury, constitute a dependent for tax purposes and entitle him to additional exemptions for workers' compensation benefits purposes. Based on their respective positions on exemptions, the defendants believe Akers is entitled to a weekly rate of seven hundred fifty-nine and 42/100 dollars (\$759.42) and Akers advocates for a rate of seven hundred seventy-four and 69/100 dollars (\$774.69).

Under Iowa Code section 85.37, "The weekly benefit amount payable to any employee for any one week shall be upon the basis of eight percent of the employee's weekly spendable earnings." The term "spendable weekly earnings," for purposes of workers' compensation, is defined in section 85.61(9) as "that amount remaining after payroll taxes are deducted from gross weekly earnings." And section 85.61(6) provides:

"Payroll taxes" means an amount, determined by tables adopted by the workers' compensation commissioner pursuant to chapter 17A, equal to the sum of the following:

- a. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under the Internal Revenue Code, and regulations pursuant thereto, as amended, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness, and old age to which the employee is entitled on the date on which the employee was injured.
- b. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under chapter 422, and any rules pursuant thereto, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness, and old age to which the employee is entitled on the date on which the employee was injured.
- c. An amount equal to the amount required on July 1 preceding the injury by the Social Security Act of 1935 as amended, to be deducted or withheld from the amount of earnings of the employee at the time of the injury as if the earnings were earned at the beginning of the calendar year in which the employee was injured.

In workers' compensation cases, a "[c]laimant is bound by the actual number of exemptions he claimed on his returns at the time of injury." Deraad v. Fred's Plumbing & Heating, File No. 1134532, 2002 WL 32125759 *4 (App., Jul. 16, 2002). The claimant must prove entitlement to an exemption by a preponderance of the evidence. Swanson v. Archer Construction, Inc., File No. 5031472, 2011 WL 5518881 *1 (App., Nov. 9, 2011). As found above, Akers has met his burden of proof with respect to exemptions. The weight of the evidence shows it is more likely than not he is entitled to seven exemptions. With seven exemptions, Akers's weekly benefit rate is seven hundred seventy-four and 69/100 dollars (\$774.69).

B. Permanent Disability.

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

Akers was fifty years of age at the time of hearing. He has a limited educational background because he has a learning disability and dyslexia. Nonetheless, he obtained a truck-driving credential and worked in that field from 2008 through the date of injury. At Heffron Services he was promoted to operations manager or foreman but that job included truck-driving and repair work. The work injury caused Akers to sustain a permanent functional disability of one percent to the right upper extremity, five percent to the whole body for vertigo, and four percent to the whole body due to headaches.

Dr. Suddarth refused to provide Akers with a medical certification for his CDL. Dr. Adelman agreed that Akers could not return to such work. Dr. Bansal assigned the work restrictions of avoiding environments with loud noises, bright lights, or fast movements, direct exposure to sunlight or driving at night, and avoiding safety-sensitive activities such as climbing ladders or operating heavy machinery because of his headaches and dizziness. Dr. Jones deferred to the other doctors.

These limitations preclude Akers from returning to truck-driving, the primary means by which he earned a living for about ten years. They also negatively impact his ability to work in construction, agriculture, and the service industry. Further, Akers is not a good candidate for retraining because of his learning limitations.

Akers has met his burden of proof on the question of permanent disability. The weight of the evidence shows he has sustained industrial disability of sixty percent. Sixty percent times five hundred equals three hundred weeks of permanent partial disability benefits.

C. Costs.

"All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commission." Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa

2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Because Akers has at least partially prevailed on the disputed issues of rate and permanent disability, the following costs are taxed against the defendants:

- Six and 47/100 dollars (\$6.47) for the costs of service of the original notice, 876 IAC 4.33(3);
- Three thousand seven hundred eighty-one and 00/100 dollars (\$3,781.00) for Dr. Bansal's report, 876 IAC 4.33(6); and
- One hundred three and 00/100 dollars (\$103.00) for the filing fee to initiate this case, including convenience fees incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES), 876 IAC 4.33(7).

VI. ORDER.

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

- 1) The defendants shall pay to Akers three hundred (300) weeks of permanent partial disability benefits at the rate seven hundred seventy-four and 69/100 dollars (\$774.69) per week from the commencement date of May 24, 2021.
- 2) The defendants shall pay accrued weekly benefits in a lump sum.
- 3) The defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.
- 4) The defendants are to be given the credit for benefits previously paid for the stipulated amount of fifty (50) weeks of compensation at the rate of seven hundred sixty-seven and 22/100 dollars (\$767.22).
- 5) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).
- 6) The defendants shall pay to Akers the following amounts for the following costs:
 - a) Six and 47/100 dollars (\$6.47) for the costs of service of the original notice;
 - b) Three thousand seven hundred eighty-one and 00/100 dollars (\$3,781.00) for Dr. Bansal's report; and
 - c) One hundred three and 00/100 dollars (\$103.00) for the filing fee to initiate this case, including convenience fees incurred by using the

payment gateway on the Workers' Compensation Electronic System (WCES).

Signed and filed this 22nd day of December, 2022.

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

BEN HUMPHREY
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Channing L. Dutton (via WCES)

Andrew T. Tice (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.