BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALBERT SCHOEN, Claimant, vs. DUANE REEDER, Employer, and FARM BUREAU PROPERTY & CASUALTY INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 5066396 ARBITRATION DECISION Head Note Nos.: 1100, 1800, 1801, 1803, 1803.1, 2500, 2800, 3000

STATEMENT OF THE CASE

Claimant, Albert Schoen, has filed a petition for arbitration seeking workers' compensation benefits against Duane Reeder, employer, and Farm Bureau Property and Casualty Insurance Company, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on December 11, 2020, via Court Call. The case was considered fully submitted on January 8, 2021 upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-6, Claimant's Exhibits 1-8, Defendants Exhibits A-H, and the testimony of claimant and Duane Reeder.

ISSUES

1. Whether claimant sustained an injury arising out of and in the course of his employment on September 15, 2017;
2. Whether claimant is entitled to temporary benefits from June 13, 2019, to September 6, 2019;
3. Whether the alleged injury was a cause a permanent disability;
4. Whether that disability is scheduled member or industrial in nature
5. The extent of permanent disability, if any,

6. The commencement date of permanent benefits, if any;
7. The appropriate rate;
8. Whether claimant is entitled to reimbursement of medical expenses (Ex. 8);
9. Whether claimant is entitled to an IME under Iowa Code section 85. 39;
10. Whether there was lack of timely notice pursuant to Iowa Code section 85.23;
11. Apportionment;
12. Costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties agree that at the time of the alleged injury, there was an employee/employer relationship. They further agree that at the time of the alleged injury, claimant was married and entitled to two exemptions.

While the defendants do not stipulate that claimant is entitled to medical bill reimbursement, they will agree that the fees and charges are fair and reasonable and that the medical providers would testify to the reasonableness of their fees and/or treatment set forth in Exhibit 8 and defendants will not offer contrary evidence.

Prior to the hearing, the claimant was paid no benefits and defendants are not entitled to any credit.

FINDINGS OF FACT

At the time of the hearing, claimant was a 57 year old person. His educational background includes entering the eleventh grade but not completing it. He testified that he was not a good student and did not do well in the core subjects of reading and writing. He left high school to farm and he has been a farm laborer for most of his working life.

In the early 80s, claimant suffered a serious injury when a large slab of beef fell on him. He was advised by a neurosurgeon to not lift anything for two years. Claimant abided by that advice and healed however from time to time claimant has suffered recurring back pain as a result.

Claimant began working for defendant employer in 2003. Prior to working for defendant employer, claimant was employed as a farm laborer for Doyle Smith from 1997 to 2003. While working for Mr. Smith, claimant was struck by the hood of a semi tractor-trailer and knocked into a silo. He suffered a shattered wrist and loss of some

teeth. (JE 1:1) Subsequent surgery fused the right distal radius. (JE 1:3) Mr. Smith did not want to pay for the injury and claimant left to work for defendant employer.

In April 15, 2014, claimant was seen at Unity Point for pain in the left hip area after falling from a semi-tractor trailer as well as pain in the right index finger. (JE 2:4) Douglas Martin, M.D., treated claimant during that visit and diagnosed claimant with significant soft tissue injury in the left hip. (JE 2:5) He recommended an MRI, which came back with signs of only minor degenerative changes. (JE 2:8) Dr. Martin concluded claimant sustained a significant sprain or strain and sent him to physical therapy. (JE 2:8) Dr. Martin further wrote, "because of the length of time since the injury has occurred, the prognosis is not as great." (JE 2:8) By May 19, 2014, claimant had improved. (JE 2:12) Dr. Martin wrote,

> Examination done today reveals that this gentleman actually has normal flexion and extension capabilities of the left hip today. He continues to have problems with internal and external rotation, and discomfort over the hip musculature posteriorly is again noted. His gait pattern is much better. As a matter of fact, you really kind of have to watch him to see just a little antalgic gait that he still has left.

(JE 2:12) Dr. Martin released claimant on June 30, 2014, to regular work with no restrictions and finding claimant to be at MMI. (JE 2:16) At this visit, claimant's range of motion was excellent and his gait pattern was normal. Id.

On or about September 15, 2017 claimant was working in the field with defendant employer. He was attempting to attach the hitch. During the process, the hitch fell on claimant's right foot. Claimant testified he thought the pole weighed 100 pounds. Defendant employer, through Duane Reeder, testified that it was "light." Much of the defendant employer's testimony was centered on the weight of the trailer hitch and pole in an attempt to discredit the claimant's testimony. Defendant employer claimed that the hitch was light and weighed "only" around 27 pounds. (Ex. G:46) He used a neighbor's scale; however, there was no control model used for the weight such as weighing a gallon of milk to show that the scale used was accurate. The pole attached to the hitch had two rods of steel. The inner rod could be extended to make the pole longer, allowing for more distance between the truck and the trailer. The trailer hitch has two short arms that extend from the pole. The two arms have a hole through the end where the pin is dropped to secure the pole to the back of the truck. The photos show that the bottom of the hitch arm was bent upwards indicating that the force of the hitch being dropped on the ground bent the steel. The top of the hitch arm was still aligned with the pole. The evidence shows that the weight of the trailer hitch was heavy enough to cause injury if dropped on a foot.

Claimant worked several months following the incident. Duane Reeder testified that he did not observe claimant to be limping nor did claimant mention that he was injured. Claimant disagrees. He told Mr. Reeder that his foot hurt him and received a hostile reply.

Defendants asserted the claimant was not credible during the hearing and pointed to a few instances where they allege claimant was inconsistent in his testimony. The first was the weight of the trailer pole. While I am not convinced that the pole weighed 100 pounds, it does not negate claimant's credibility that he consistently told people that it weighed 100 pounds. That is what he believed based upon his familiarity with the trailer hitch and pole. If the pole weighed something less, he was not aware. Mr. Reeder's testimony, however, was that it was "light" even though the pole consisted of two steel rods and was heavy enough to cause the bottom arm of the trailer hitch to be bent upwards. Even if the trailer hitch was twenty-seven pounds as Mr. Reeder testified, it is a considerable amount of weight to fall on a foot.

Defendants also argue that claimant twisted facts to benefit his case. They assert claimant first said that he made Mr. Reeder aware of his injury two to three months after the incident but then later changed to say he made Mr. Reeder aware of the injury earlier.

The parties dispute that defendant employer had notice of claimant's injury and in the defendants' brief, defendants argue that Mr. Reeder was not aware of claimant's injury. The conversation is as follows:

> Schoen testified:
>
> [Hamilton] Q. Did you tell – did you have a conversation with Mr. Reeder that your foot was hurt?
>
> [Schoen] A. When I got in the pickup after it happened, I said, "What did you do that" – "What the F did you do that for?" And he said, "What" And then I said, "You dropped it on my foot," and he said, "Well you didn't really say anything" and that was it.
>
> Q. Did you tell him your foot hurt?
>
> A. I told him, "What did you do" – I didn't say it hurt. I said "What did you do that for?"

Tr. 50:16 – 51:3. Reeder to a similar extend testified:

> [Russell] Q. Okay. After this happened, did he mention that he was hurt?
>
> [Reeder] A. No.
>
> Q. Okay. Day of the injury, did he stop working at all?
>
> A. No.

Q. Did he mention it at any time during the day that he was injured?

A. No.

Tr. 143:13/21.

Schoen reports that he did not tell Reeder he injured his foot until 2-3 months later after the alleged incident. He testified:

[Hamilton] Q. So after that day, did you have other conversations after that day telling him that foot was injured?

[Schoen] A. Yes, a couple months later, yes, about **two or three months later** I said something.

Q. Wait, wait, wait. Let's not get too ahead of ourselves. What did you tell him?

A. I said, "You need to turn this over to your insurance company," and he said no. He wasn't going to do it."

Tr. at 51:4-13 (emphasis added).

Reeder denies that Schoen mentioned anything about a foot injury until almost a year later. Tr. at 144.

[Russell] Q. Did he ever tell you he was injured in 2017?

[Reeder] A. No, did not tell me he was injured.

Q. Did he – when did he mention finally – was it – that he was injured?

A. To the best of my knowledge, he mentioned that a year later that he was having – his foot was bothering him.

Q. Did you turn it in to work comp at that point?

A. Yes, I turned it in to workmen's comp when he wanted me to turn it in because he said he needed medical attention.

(Tr. at 144:11-23.)

The preceding shows how defendant employer was aware that the hitch was dropped on claimant's foot directly after the incident occurred. This is consistent with claimant informing Mr. Reeder earlier of a possible injury.

Claimant testified that he believed he saw someone at his family practice clinic for the injury but then later acknowledged the medical records did not conform with that recollection.

Claimant testified that defendant employer was reluctant to pay for any injury sustained on the job. When claimant hurt his finger in 2011 or 2013, defendant employer said "we do not fix fingers or toes." (Testimony) Claimant has not sought out care for the finger and Mr. Reeder testified that while he knew of the injury he presumed it was not serious as claimant never asked for care.

In 2013, claimant fell and injured his left hip. Claimant maintained that Mr. Reeder did not want to pay for care, but eventually Mr. Reeder submitted it to his insurance company after receipt of a letter from claimant's attorney. (Ex 1:1) Claimant testified that defendant employer was initially reluctant to accept responsibility for the injury and said, "if your lawyer sends me another [expletive] letter, you will no longer work for me."

It is not credible that two steel rods designed to haul loads behind a truck and that was heavy enough to cause the bottom arm of the tractor trailer pole to bend upward was "light." Further, Mr. Reeder's behavior toward injuries was consistent. Unless pressed by an attorney, Mr. Reeder did not have any inclination to submit the injury of the claimant to insurance. Claimant is a hard worker. He works through pain and does not often seek medical treatment. Even after serious injuries, claimant has attempted to return to work. He has worked heavy manual labor most of his adult life even though he has had a multitude of pain complaints, as defendants point out in their brief. During the hearing, claimant withstood a tough cross-examination and did not shake or stutter or become overly argumentative. His demeanor was that of a credible testifier. Mr. Reeder was more evasive during testimony. Based on the foregoing, it is deemed that claimant was more credible than Mr. Reeder.

Claimant presented to the ER on September 19, 2017, for post-operative complaints following an exploratory laparotomy on September 14, 2017. (JE 3:18-22) During this visit, there was no mention of right foot injury.

Claimant had health insurance and sought out medical care for other issues during 2017 and into 2018, however did not seek treatment for his right foot pain until August 15, 2018. While defendants' characterize this as evidence no right foot injury occurred on September 15, 2017, it could also be a sign of claimant's willingness to work through pain and not seek care when he could no longer ignore it. Claimant returned to work following a surgical procedure on September 14, 2017, for example, the day before his work injury.

On August 15, 2018, claimant presented at Urgent Care with complaints of the right foot pain. (JE 4:75) The x-rays were negative but for the 1st MTP joint degenerative changes. (JE 4:78) Lindsey M. Stock, PA-C, did not appreciate any injury but claimant was insistent that something be done. (JE 4:77) Ms. Stock referred

claimant for a foot and ankle evaluation. He was seen on August 27, 2018, by Valerie K. Tallerico-Antonopolous, DPM, who determined claimant had an essentially normal presentation but for the pain which she felt was out of proportion with the x-ray results. (JE 4:80) To address the nerve pain, Dr. Tallerico-Antonopolous increased claimant's Lyrica prescription, which he already took for chronic back pain. (JE 4:81) On September 24, 2018, claimant was referred to Dr. Stadsvold for treatment of the nerve damage. Dr. Tallerico-Antonopolous felt that the surgery would have limited benefit. (JE 4:85) Claimant disputed this medical record testifying that he does not recall being told the surgery would be unhelpful.

In the meantime, claimant was being treated for glaucoma. (JE 5:86)

Claimant was seen on November 8, 2018, by Chad A. Stadsvold, D.O. The incident was documented as follows:

> The patient is a 55-year-old male who has had ongoing right foot pain since September 2017 when a trailer fell on his right foot. He has had ongoing pain on the top of his foot as well as into his first and second toes since that time, preventing him from being able to walk without discomfort. With his altered gait, he has gotten increased pain in the left hip region as well.

(JE 3:25) Claimant testified at hearing that he reported to his physicians and medical care providers that the pole or tongue of the trailer hitch weighed 100 pounds. In addition to the pain in the foot and left hip, claimant described hypersensitivity as well as numbness in the top of the foot. (JE 3:25) X-rays from August 2018 revealed moderate to severe osteoarthritis of the first MTP joint. (JE 3:28) Dr. Stadsvold was concerned that claimant had some damage to the right superficial peroneal nerve and recommended further diagnostic testing. (JE 3:28) Dr. Stadsvold also noted that while claimant had been off work due to glaucoma surgery, it was advisable to keep him off of work specifically due to his foot and ankle issues. (JE 3:29)

X-rays of the hip taken on December 12, 2018, showed mild to moderate degenerative changes in the lumbar spine but no acute or degenerative processes in the left hip. (JE 3:36) Dr. Stadsvold concluded the following:

> IMPRESSION:
> 1. Advanced osteoarthritis in the 1st MTP joint.
> 2. Chronic appearing fragmentation of the medial sesamoid under the 1st metatarsal head, with mild associated bony edema.
> 3. Degenerative bony edema at the interface of the 2nd metatarsal base, middle cuneiform, and lateral cuneiform.
> 4. Moderate peroneus longus tendinopathy, inferior to the ankle joint.

(JE 3:37)

Claimant was seen by Dr. Stadsvold on December 17, 2018, in follow up to the MRI. (JE 3:50) Subjectively, claimant had ongoing pain, numbness and hypersensitivity on the top of the right foot and left lateral hip pain. (JE 3:50) His gait was antalgic with a shorter stride on the right. Id. Claimant walked more on the outer aspect of the right foot and exhibited tenderness in the left lateral hip as well as tenderness over the dorsum of the right foot into the toes. (JE 3:51) EMG was ordered and Dr. Stadsvold increased claimant's Lyrica prescription to treat the neuropathic pain. (JE 3:51)

On February 9, 2019, claimant returned to Dr. Stadsvold for the complaints with the right foot and left hip. (JE 3:69) The NCS/EMG revealed mild right superficial peroneal neuropathy. Id. Dr. Stadsvold recommended claimant see Dr. Phistikul, a foot and ankle surgeon. Id.

On February 15, 2019, claimant was seen by Dr. Phistikul. (JE 6:90) Dr. Phistikul diagnosed claimant with right foot pain related to the crush injury suffered on September 15, 2017. (JE 6:90) Dr. Phistikul recommended claimant discuss injection therapy with his family doctor but that claimant was not a surgical candidate at this time. (JE 6:90) Because of claimant's ongoing pain, Dr. Phistikul administered a diagnostic injection of Lidocaine at the first MPT joint, superficial peroneal nerve medial branch and saphenous nerve. The conclusion was that the superficial peroneal nerve block was most beneficial as it resulted in a 50 percent reduction of pain. (JE 6:94) Dr. Phistikul wrote that the "majority of pain is related to the arthritis and superficial peroneal nerve neuritis." (JE 6:95) After a discussion of options, claimant agreed to surgical intervention. Id.

On June 13, 2019, claimant underwent excision of the superficial peroneal neuroma and a first metatarsophalangeal fusion. (JE 3:39) Dr. Stadsvold kept claimant off work. (JE 3:41) Claimant began weight bearing on July 22, 2019. (JE 6:102) On August 1, 2019, claimant was seen at Tri-State Specialists for an abnormal CT and constipation. (JE 6:105) His gait was documented as stable and there were no ongoing complaints of pain reported. There was a notation in the surgical history on his foot. (JE 6:105)

On March 15, 2019, defendants obtained opinions from Dr. Tallerico-Antonopolous wherein she opined that claimant's arthritic changes could be from injury but also could be from every day wear and tear and degeneration. (DE B:31) She also wrote that "If severe crush injury, must present within days of injury. Because no initial presentation it is hard to definitively say his issues were caused by incident as they could be non-related and pre-existing as well." (DE B:32)

Claimant underwent an IME with Sunil Bansal, M.D., on February 19, 2020. (Ex 4:28) During the examination portion, Dr. Bansal recorded tenderness to palpation over the lumbar back with guarding noticed into the left sacroiliac joint, positive Fabre's test on the left, and tenderness to palpation into the sacroiliac joint on the left hip with full range of motion. (Ex 4:28) There was mild tenderness to palpation over the distal radial aspect and a positive Finkelstein's test. (Ex 4:28)

Dr. Bansal concluded claimant sustained a right foot crush injury as a result of the work injury on or about September 15, 2017, and an aggravation of the sacroiliitis due to the altered gait. (CE 4:30) Dr. Bansal further opined that as the right foot pathology and pain was permanent so is the aggravation to the pre-existing degenerative disease in the sacral spine. Id.

Dr. Bansal assessed a 10 percent lower extremity impairment (4 percent whole person) for the right foot and 5 percent whole person impairment to the low back given the radicular complaints, loss of range of motion, and guarding. (CE 4:30) He placed claimant at MMI as of February 19, 2020. (CE 4:29)

Dr. Bansal charged $594.00 for the examination and $2,793.00 for the report. (CE 4:32)

Bryan M. Trout, M.D., performed an examination of claimant at the request of the defendants. (DE C) His diagnosis was hallux limitus/degenerative arthritis of the right 1st metatarsophalangeal joint (MTPJ) and traumatic neuroma, superficial peroneal nerve status post excision. (DE C:33) He opined that it was unlikely that patient's right foot injury caused any permanent damage to the 1st MTPJ but rather traumatic neuroma. (DE C:33) The arthrodesis was not related but the neuroma excision was. Id. Dr. Trout placed claimant at MMI on July 22, 2019 and assigned a 2 percent whole person impairment with no permanent restrictions. (DE C:34) There was no mention of the hip. Later, after the defense attorney pointed out that the records previously sent to Dr. Trout indicated that claimant did not seek out medical treatment for 11 months. (DE D:35) Also attached was an affidavit from Mr. Reeder maintaining claimant made no complaints regarding his right foot and that the weight of the trailer was only 30 pounds and the falling distance was around 18 inches. (DE D:35) With these documents, Dr. Trout revised his opinion to state the neuroma was not related to the work injury. (DE D:35)

On claimant's application for SSD, he attributes his pain to stomach condition, glaucoma, and muscle cramps. (DE A:11) At hearing he testified he did not believe the eye problems and stomach condition were debilitating but in the SSD application he said that he does not do house or yard work because of limited abilities with sight. (Ex A:17)

Claimant has a lien of $11,475.75 for the medical bills incurred for his foot injury and charges of $9,939.00 from Tri-State Specialists. (CE 5)

Claimant maintains that his average weekly wage was $584.39 with $393.26 as the benefit rate. Weeks from July 14, 2017, July 28, 23017, and June 30, 2017 were not included in claimant's calculation as unrepresentative. (CE 7:48) Claimant's weekly wage varied between $420.00 up to $997.50. (CE 7:48-50) On occasion, the weekly wage fell below $400.00 such as on February 3, March 31, June 30, July 14, July 28, and December 8. The pay during these periods were not consistent with the other weeks. Defendants exclude only June 30, 2017, as it was a week claimant was on

vacation. For defendants, the rate calculation is $485.77 average weekly wage for a benefit rate of $332.66 per week. (DE H:52)

Claimant has looked for a few jobs since February 15, 2020, including Lowes, Home Depot, Wells Enterprises, Menards, Fedex, Seaborg Triumph Foods, among others. (CE 6:47)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

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).

On September 15, 2017, a steel hitch of some significant weight dropped on claimant's foot. He did not seek out immediate medical attention but the facts accepted by the undersigned include that claimant had ongoing pain in his right foot that worsened as time went on. He eventually sought medical care almost a year after the injury occurred. By that time, his nerve pain had become a chronic condition that was not likely to be corrected by surgery.

While there is a large lapse in time between September 15, 2017, when the trailer hitch fell on claimant's foot and August 15, 2018, which is the first date claimant sought out medical care for his right foot, his behavior is consistent with someone who attempted to work through the pain as he had done in the past. Even though claimant had difficulty lifting more than 10 pounds with his right upper extremity for almost a decade, he still did heavy manual labor with no official restrictions or accommodations. Dr. Phistikul diagnosed claimant with right nerve pain following a crush injury and Dr. Bansal opined claimant's right foot degenerative condition was aggravated by the injury. Dr. Trout, the foot surgeon retained by defendants, also initially opined claimant's neuroma was related to the crush injury. Dr. Tallerico-Antonopolous could not rule it out. Dr. Trout later changed his opinion based on no new medical evidence but the affidavit of Mr. Reeder attesting to claimant's silence regarding his right foot pain. As discussed above, the claimant's testimony is adopted over that of Mr. Reeder and thus Dr. Trout's revised opinion is based on information that is either inaccurate or not fully proven. The greater weight of the evidence supports a finding that claimant developed chronic nerve pain as a result of a trailer hitch of some weight, at least 27 pounds, dropping on his foot.

While there were other doctor's opinions that claimant's right foot injury was a chronic nerve problem, those opinions did not identify an alternate causation theory for the chronic nerve issue. Thus based on the expert opinions, the claimant's right foot injury caused subsequent nerve damage resulting in chronic pain.

That right foot injury caused claimant to walk with an altered gait.

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

Dr. Stadsvold observed claimant to walk with an antalgic gait with a shorter stride on the right. He walked more on the outside of the right foot and exhibited pain in the

hip on palpation. Dr. Bansal opined that this antalgic gait was the result of the right foot pain and that is consistent with Dr. Stadsvold's findings. Therefore, it is found claimant carried his burden to prove that he sustained a right foot injury on or about September 15, 2017, when a tractor trailer hitch fell on his right foot resulting in neuritis and a sequelae of that right foot injury was an altered gait that caused and/or aggravated claimant's pre-existing degeneration in his left hip and low back.

A hip injury is generally an injury to the body as a whole and not an injury to the lower extremity. The lower extremity extends to the acetabulum or socket side of the hip joint. For a hip injury to be industrially ratable, disability in the form of actual impairment to the body must be present. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

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

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

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

Dr. Bansal assigned 5 percent whole person impairment to the low back and 4 percent whole person for the right foot. Dr. Trout gave an opinion only for the right foot and placed the impairment rating at 2 percent. Claimant is a hard worker who has, in the past, shown a strong motivation to return to work. However, given the multitude of health issues, many of which are unrelated to the work injury, claimant has filed for SSD and shown only a half-hearted attempt to seek new employment. His past work history is primarily heavy duty labor which he can no longer perform but not merely due to his right foot and hip issues but because of his gastrointestinal and eye issues. He is an older worker with no experience in the sedentary to light duty categories of work. Defendant employer did not terminate claimant. Claimant choose to quit. Based on the foregoing, it is determined claimant has sustained a 25 percent industrial loss.

Defendants argue that claimant's recovery is barred by lack of notice.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information, which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense, which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Defendants acknowledge that Mr. Reeder was aware the trailer hitch/pole had dropped on claimant's foot but not that he was injured. There is no requirement that the defendant know of the exact injury occurred but rather that there was an incident that could have caused an injury. Defendant employer then had an obligation to investigate whether an occurrence of an injury resulted from claimant's work. Defendants did not carry their burden to prove that they did not have actual notice of the occurrence of an injury.

As stated above, compensation for industrial benefits begins at the end of healing period.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The claimant has not returned to work nor is he medically capable of returning to substantially similar employment thus the question is when claimant reached MMI for his foot and left hip/low back injuries. Dr. Trout set the date of MMI at July 22, 2019. According to the exhibits, his last date of service with Dr. Phistikul was July 22, 2019. (See Ex 5:45) Claimant was still in physical therapy at that point. Dr. Bansal placed claimant at MMI as of February 19, 2020. Based on Dr. Bansal's report and that claimant was still attending physical therapy as of July 22, 2019, the date of February 19, 2020, is adopted as the date claimant reached MMI and thus the commencement date of benefits. Claimant seeks temporary benefits from June 13, 2019, to September 6, 2019. This period of time claimant was still healing and had not yet achieved MMI nor

had he returned to work nor was he capable of returning to substantially similar employment. Thus, he is entitled to temporary total disability or healing period benefits from June 13, 2019, to September 6, 2019.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant seeks reimbursement and payment for medical expenses incurred in the diagnosis and treatment of his right foot and left hip/low back. Based on the causation finding, claimant is entitled to recover of those medical expenses.

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

Claimant argues that there are three weeks that are non-representative. Defendants excluded June 30, 2017, as it was a vacation week. The exclusion of weeks is an argument which benefits claimant and thus it is his burden to prove that those weeks should not be counted. Claimant included a handwritten ledger containing the amounts paid for the weeks prior to the injury. July 14, 2017, claimant was paid $240.00 and July 28, 2017, claimant was paid $360.00. Those two amounts do appear to be substantially lower than the other weeks and not representative. Thus the claimant's rate calculation is adopted. The weekly benefit rate is $393.26.

Claimant seeks reimbursement of the examination performed by Dr. Bansal.

Iowa Code section 85.39 requires reimbursement for an IME and reasonably necessary transportation expenses "[i]f an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low." Iowa Code § 85.39.

Dr. Tallerico-Antonopolous provided opinions that did not confirm or deny the causation between claimant's injury and claimant's right foot issues. The commissioner has held that there is a "distinct" difference between evaluations of permanent impairment and evaluations to determine causation. See Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal Mar. 26, 2018). Thus the provisions of Iowa Code section 85.39

are not triggered and claimant is not entitled to recovery of Dr. Bansal's fee and examination pursuant to 85.39. However, claimant can recover the cost of obtaining the report under Rule 876 IAC 4.33. 876 IAC 4.33.

Defendants asserted apportionment in the hearing report but this was not briefed. Iowa Code section 85.34(7) states:

> An employer is fully liable for compensating only that portion of an employee's disability that arises out of and in the course of the employee's employment with the employer and that relates to the injury that serves as the basis for the employee's claim for compensation under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

Claimant did not appear to be compensated for pre-existing conditions and thus any apportionment argument does not have sufficient evidence to support a reduction. There is no evidence in the record of previous settlements or payments.

Claimant seeks an assessment of costs. As he is the prevailing party, the costs will be awarded.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay claimant one hundred twenty-five (125) weeks of benefits commencing on February 19, 2020, at the stipulated rate of three hundred ninety-three and 26/100 dollars ($393.26).

Claimant is entitled to temporary benefits from June 13, 2019, to September 6, 2019.

Defendants shall pay accrued weekly benefits, including but not limited to the underpayment of the weekly rate, in a lump sum together with interest. 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. Apr. 24, 2018).

Defendants shall pay directly to the medical providers, reimburse claimant for any out-of-pocket expenses, and hold claimant harmless for all medical expenses itemized in Claimant's Exhibit 5 and 8.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding as well as the report cost of Dr. Bansal.

Signed and filed this 19th day of April, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Steve Hamilton (via WCES)

James Russell (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.