BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CRAIG SILLS, Claimant, vs. SAINT CECILIA SCHOOL, THE ARCHDIOCESE OF DUBUQUE, Employer, Self-Insured, Defendants.	:	File No. 5068620 ARBITRATION DECISION Head Note Nos.: 1108, 1800, 1801, 1802, 1803.

STATEMENT OF THE CASE

Claimant, Craig Sills, has filed a petition for arbitration seeking worker's compensation benefits against Saint Cecilia School/The Archdiocese of Dubuque, self-insured employer, as defendant.

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 June 23, 2020, via Court Call. The case was considered fully submitted on July 14, 2020, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-8, claimant's exhibits 1-6, 9-13, Defendants exhibits A-E, and the testimony of claimant, Timothy Rahto, Andy Hobbs, Mary Sills, Eric Abrams, and Jeremy Hess.

ISSUES

The nature of claimant's injuries arising out of the June 5, 2017 injury date;

Whether claimant is entitled to temporary disability benefits from August 12, 2019 through May 20, 2020;

The extent of claimant's permanent disability;

The appropriate commencement date for permanent partial disability benefits;

Whether claimant is entitled to reimbursement of medical expenses itemized in Exhibit 6;

The assessment of costs.

STIPULATIONS

The parties agree claimant sustained an injury which arose out of and in the course of his employment on June 5, 2017. This injury was the cause of temporary disability and permanent disability. The parties disagree as to the extent of claimant's entitlement to both temporary and permanent benefits.

While the defendant disputes that it is responsible for temporary benefits between August 12, 2019 and May 20, 2020, the parties agree the claimant was off work during this period of time.

The appropriate commencement date for permanent partial disability benefits is in dispute but the disability is industrial in nature.

At the time of the injury, claimant's gross earnings were $470.00 per week. He was single and entitled to one exemption. Based on the foregoing the weekly benefit rate is $299.05 per week.

While the parties dispute the claimant is entitled to reimbursement of medical expenses, they agree that the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the list of expenses and will not offer contrary evidence.

FINDINGS OF FACT

At the time of the hearing, claimant was a 50 year-old person. At all times material hereto, claimant was a single person entitled to one exemption. His most recent employment was with defendant employer as a school custodian.

On or about June 5, 2017, claimant slipped on a floor. His lower back hit first and then his left leg. He felt immediate pain but was able to drive himself to the McFarland Clinic.

He was seen by Lacreasia K. Wheat-Hitchings, M.D., on the same day. Dr. Wheat-Hitchings diagnosed claimant as suffering from lumbar strain, hamstring strain, pain in the left calf. (Joint Exhibit 1:1) On examination he had pain with palpation, some swelling, some tenderness, some spasms and antalgic gait. Id. Claimant was prescribed Indomethacin and Robaxin and given modified duty restrictions of no repeated bending or twisting greater than five times an hour. No uninterrupted walking or standing for more than 45 minutes without a five minute break. Id. In the follow-up visit on June 7, 2017, claimant reported resolution of the hamstring pain but an increase in the lower back pain. (JE 1:2) New medications were prescribed and an order for physical therapy was made. Id.

During the initial evaluation for physical therapy, claimant was noted to have reduced range of motion in the low back with palpable tenderness along the lumbar spine, as well as the left sciatic notch and lumbar paraspinals. (JE 1:6)

Claimant returned to work the following day with his restrictions and he finished his work week. However, the following Monday, he complained of a sore back. He then had a friend pass away and took time off to address that matter. When he returned to work, he came with more restrictions which the defendant employer could not meet.

On June 18, 2017, claimant presented to the ER with complaints of acute low back pain with right-sided radiculopathy. (JE 2:1) Claimant reported it hurt on the right side when he walked. (JE 2:1) He had tenderness upon palpation in the lumbar spine and the right buttock area. (JE 2:1) The nurse practitioner who saw claimant concluded that he had inflammation of the sciatic nerve on the right. (JE 2:2) Medications were given and he was ordered to follow up with the work comp provider. Id.

Claimant returned to Dr. Wheat-Hitchings on June 22, 2017 reporting no improvement. (JE 1:14) He reported that his pain was 8/10 on a 10 scale while standing and 10 on a 10 scale while driving with radiating pain down the left gluteal and thigh. (JE 1:14) An MRI was ordered and claimant was given sedentary duty restrictions. Id. The MRI was conducted on June 28, 2017, and showed marked degenerative changes in the apophyseal joints with mild ligament flavum hypertrophy causing slight narrowing of the later recess with no significant spinal stenosis at L4-L5 and at L5-S1 there was large left-sided herniated extruded disc fragment extending into the neural foramina causing marked impingement on the nerve root and slight impingement on the thecal sac. (JE 1:19) There was also moderate degenerative changes at the apophyseal joints without significant stenosis at the same level. Id. Based on the MRI, Dr. Wheat-Hitchings took claimant off of work and referred claimant to orthopedic surgeon Dr. Kaspar. (JE 1:20)

On July 25, 2017, claimant was seen by Sarkis Kaspar, M.D., who recommended medications, a lumbar epidural steroid injection (LESI), and possible surgery if conservative measures did not alleviate the pain. (JE 1:27) The claimant was returned to modified duty on July 26, 2017 with no lifting or pushing over 5 pounds, no repeated bending or twisting of the lumbar spine, no deep squatting or kneeling, no uninterrupted sitting for over 15 minutes and no uninterrupted walking or standing over 10 minutes. He was limited to three hours of work per day. (JE1:28) Defendant was unable to meet these restrictions.

On August 10, 2017, claimant was seen by Arnold Parenteau, M.D., for low back pain. (Ex 2:5) Claimant had a positive straight leg raise test on the left but negative on the right. He had absent left ankle reflex and reduced strength on the left. Id. Epidural injection was administered but provided no relief. Id.

The conservative measures were unhelpful and claimant went ahead with the surgery October 20, 2017. (JE 1:29) A month following the surgery, claimant reported ongoing numbness from the mid thigh down to the ankle; however, the knife-like radiculopathy was resolved. (JE 1:53)

On February 22, 2018, claimant was seen by Dr. Kaspar in follow-up reporting spinal pain, left leg numbness, and “rocks in left shoe” sensation. (JE 1:53) He recalled an incident wherein he was moving off his couch in December 2017 and felt a severe change after. (JE 1:53) At hearing, he characterized the pain as similar to getting stabbed in the back and that he was not the same after. A new MRI was ordered which showed no significant changes or traumatic injury. (JE 1:57) In a follow-up visit on April 10, 2018, with Dr. Parenteau, claimant reported severe pain in the anterior and posterior left thigh, numb foot, and mild symptomatology in the right leg. (JE 1:59) Claimant was taking Tylenol and was amenable to lumbar epidural steroid injections. (JE 1:60) Subsequent EMG testing was consistent with left S1 radiculopathy moderate to severe and borderline L5 radiculopathy. (JE 1:63) Dr. Kitchell noted that there was some discoloration which might suggest the development of CRPS. (JE 1:65) On June 14, 2018, Dr. Parenteau ruled out CRPS but administered ESIs that provided no relief. (JE 2:40, CE 2:40) In August 2018, Dr. Parenteau and claimant discussed a possible fusion. Dr. Parenteau wanted a second opinion, however, and claimant was referred to a neurologist.

Claimant was evaluated by David Boarini, M.D., on September 26, 2018. (Ex 3:3) Dr. Boarini felt claimant exhibited exaggerated pain behavior and that the MRI did not reveal any explanation for the ongoing pain. Claimant believed he had suffered nerve damage based on what he believed he had been told by Dr. Kitchell and a repeat EMG was ordered. The October 29, 2018, EMG showed non-specific and non-diagnostic findings and that there was nothing in the tests to support surgery. (Ex 3:6-7) Dr. Boarini recommended physical therapy and medications. (Ex 3:12)

Claimant was not able to complete physical therapy due to his severe pain. He testified that the aquatic therapy was too painful and too tedious to get to, particularly in the winter.

On January 9, 2019, claimant returned to Dr. Parenteau and discussed a spinal cord implant. Another injection was administered the following day. (JE 2:50) On February 19, 2019, claimant was seen by Dr. Kaspar for the ongoing pain in the back radiating down the left leg. (Ex 1:66) The pain was sharp and seemed to be getting worse. (Ex 1:66) He wanted to consider surgery. (Ex 1:66) Dr. Kaspar wrote “I don’t advocate SCS (spinal cord stimulator) when there is compressive pathology that can be addressed surgically, but if not successful then SCS might become an option. (Ex 1:66, 67)

On March 18, 2019, claimant took himself to the ER for left leg pain. The ER doctor felt that the pain was related to the lumbar disc herniation. (JE 2:52, 55)

A third MRI on March 28, 2019, showed no significant changes from the previous MRI. (JE 1:69)

Dr. Schmitz saw claimant on April 10, 2019, for the recurrent left radicular leg pain. (JE 4:1)

> I had a lengthy discussion with Craig today in clinic. This is a 49-year-old gentleman who has a previous history of a LEFT L4 to S1 posterior lumber decompression. He is now presenting with recurrent LEFT leg radicular pain. He has an [sic] magnetic resonance imaging which does not demonstrate any evidence of pathology but rather a recurrent disk herniation. He has normal EMG. Every conservative treatment measures he has tried makes him worse including physical therapy and injections. He has several findings on exam consistent with a nonantalgic source for his pain. These would consist of whole body spine pain with axial compression of his head. He has pain with simulated trunk rotation. He has diffuse tenderness to palpation throughout his LEFT leg. He has distractible straight leg raise. He has distractible extreme tenderness to palpation throughout his low back. I certainly do not think this is going to bode well for any further interventions going forward. I did discuss with him at this time I felt as though further treatment is likely going to make him worse. We are going to see him back on an as-needed basis. I do think that an appropriate next treatment step would be an FCE. I do think he is likely at MMI at this time. I will see him back on an as-needed basis and if he has any questions or concerns he will not hesitate to contact us.

(Ex. 4:3)

Dr. Schmitz did not believe further interventions were going to be helpful for the claimant and recommended an FCE. (JE 4:3)

Claimant returned to Dr. Kaspar on April 11, 2019 for back pain, left leg numbness and left leg pain. (JE 1:74) He maintained he was having difficulty walking without a limp. However, Dr. Kaspar observed claimant to walk with a normal gait. (JE 4:2). During that visit, it was discussed the claimant had seen another surgeon who did not recommend surgery. Claimant also had an appointment to see Dennis Fry, M.D., for vascular studies and Dr. Kaspar recommended that the vascular issues be worked up before any spinal surgery was entertained. Dr. Kaspar wrote claimant's symptomatology matched the moderate neuro-foraminal stenosis on the diagnostic studies and that there could be an option of fusion surgery or spinal cord stimulator. (JE 1:74) Dr. Kaspar was unsure whether the recurrent stenosis and possible radiculopathy was the source of claimant's pain or whether it was "heightened symptom perception." (JE 1:74) Dr. Kaspar acknowledged that the claimant appeared to be conveying genuine pain and was interested in surgery. (JE 1:74)

On April 22, 2019, claimant was evaluated by Dr. Fry for bilateral lower extremity claudication. (JE 3:15) He had normal arterial physical exam and duplex and Dr. Fry noted the claimant's pain was likely musculoskeletal in nature. Id. Dr. Fry also documented claimant as having normal gait and stance. (JE 3:14)

On May 11, 2019, claimant was walking to the car and fell. He took himself to the emergency department for back pain. (JE 2:59) The exam was notable for decreased

left foot perfusion and claimant reported improvement after the IV medications. (JE 2:59)

On May 23, 2019, the functional capacity evaluation was unable to be completed due to claimant's complaints of pain. (JE 5) Claimant's physical demand level was not assessed due to the termination of the testing. (JE 5:2) Claimant maintained during hearing that the pain level during the functional capacity evaluation (FCE) was the result of a flair up of pain following the fall on May 11, 2019. This was not documented in the FCE.

Claimant returned to Trevor Schmitz, M.D., on July 24, 2019 to discuss the results of the functional capacity evaluation. (JE 4:6) The issues regarding the non-anatomic source of pain were discussed with the claimant and Dr. Schmitz opined there was not a reliable surgical option that would address the claimant's concerns. (JE 4:6) Dr. Schmitz also opined that there was nothing structurally in the claimant's body that would keep him from doing the things he wanted to do. Claimant was released without restrictions. (JE 4:6)

On June 17, 2019, claimant was evaluated by Joseph Newman, DPM, for left foot pain. (JE 6) There was no evidence of acute osseous injury but rather signs of degenerative arthritis throughout the foot and ankle with calcaneal spurring. (JE 6:2) Claimant was prescribed a Medrol dose pack but it had no effect. (JE 6:5) A left tibial nerve block was administered on July 18, 2019, but that, too, offered no relief. (JE 6:9) At his next visit on August 8, 2019, he reported increased pain shooting from his left knee into his foot and toes. Id. An MRI revealed a small longitudinal split tear of the peroneal brevis tendon and claimant was referred for a surgical consult with Mark Sorrentino, DPM. (JE 6:14; JE 2:66-67) Dr. Newman wondered if there was a radicular component or perhaps the development of chronic regional pain syndrome (CRPS). (JE 6:14)

In August, claimant met with defendant employer. Defendant employer was prepared to provide him work within his restrictions. This collection of tasks was not a regular job but rather created for the claimant within his restrictions. However, claimant stated he was not healthy enough to return to work even with the accommodations.

On September 3, 2019, claimant was seen by Dr. Sorrentino complaining of left foot and ankle pain. (JE 6:19) Claimant reported that Dr. Kitchell informed him that he had spinal nerve damage. (JE 6:19) Dr. Kitchell had noted that the EMG showed signs of impingement. Dr. Sorrentino also felt claimant might be suffering from radicular pain from the spinal nerve damage and that the partial tear of the peroneus Brevis was superseded by the other neurologic symptoms claimant reported. Id. Claimant was sent for further testing.

On September 4, 2019, claimant returned for a recheck of the back pain. (JE 4:7) His pain was severe and daily with aggravating factors including daily activities and alleviating factors being rest and ice. (JE 4:8) Trevor Schmitz, M.D., recorded that the

claimant was not happy with the treatment and that he needed a second EMG because his foot surgeon told him he had significant nerve damage, but the surgeon would not order the EMG. (JE 4:8) Dr. Schmitz terminated the patient / doctor relationship and refused to see claimant again. (JE 4:9) On August 1, 2019, and again on September 30, 2019 Dr. Schmitz opined that claimant had sustained a 10 percent whole person impairment, did not recommend further treatment for the claimant, and opined that the left foot was not related to the claimant's original work injury. (JE 4:11-12)

On December 19, 2019, claimant was seen by Physician's Assistant Christensen at the UIHC Orthopedic Department. Claimant reported his work related fall in 2017 but also that he had an incident of trench foot which he attributed to sitting outside in the rain listening to an Iowa State football game. (JE 7:2) PA Christensen noted claimant had diffuse left lower extremity pain, neuropathy and weakness. (JE 7:2) PA Christensen did not believe claimant's problems were foot or bone related but ordered a repeated EMG and referred claimant to the spine team for evaluation. (JE 7:2) On February 25, 2020, the EMG was conducted which showed no electrophysiological evidence of active left-sided lumbar radiculopathy and that the difference in the motor responses between the left and right might be technical in nature due to swelling of the left foot. (JE 7:9)

A second functional capacity evaluation was completed on March 31, 2020. The therapist opined that the claimant had given maximal effort and that as a result, claimant fell within the sedentary physical demand category for 8 hours of work per day 40 hours per week. The restrictions recommended by the therapist include the following:

- Waist to Floor lifting rarely 5 lbs., occasionally 2 lbs.
- Waist to crown (handles) lifting rarely 10 lbs. and occasionally 5 lbs.
- Waist to crown (preferred) 20 lbs. rarely and occasionally 10 lbs.
- Front carry 20 lbs. rarely and occasionally 10 lbs.
- Push static 70 lbs. pull static 72 lbs. and used right lower extremity for strength
- Occasional elevated work, standing work, kneel/half kneel, walk and sit
- Rare forward bending-standing, stairs
- Never crouch
- Bilateral hand grip, hand/finger strength and coordination fell within values for 2/3 of this age/gender group or were average

(Ex 8)

Dr. Bansal conducted an independent medical examination on May 20, 2020. Dr. Bansal opined that the claimant sustained a lumbar disc herniation treated with decompression and discectomy along with recurrent disc herniations. Dr. Bansal opined the claimant would benefit from a transforaminal lumbar interbody fusion and, if that failed, spinal cord stimulator. Dr. Bansal opined that claimant sustained a 13 percent impairment of the whole body and adopted the work restrictions of the March 31, 2020 functional capacity evaluation.

Claimant was initially denied Social Security benefits on April 30, 2018. He appealed and the Administrative Law Judge opined that the claimant was disabled on November 8, 2019, and subsequently claimant was awarded benefits.

On March 12, 2020, defendants wrote to claimant asking for follow-up on the claimant's work status. (Ex D) Claimant replied that he was in contact with his medical provider, undergoing a functional capacity evaluation at the referral of his own medical doctor, and that he planned to return to work as soon as he was healthy. (Ex D:41)

Rene Haigh, MS, CRC, performed a vocational rehabilitation assessment. In preparation for issuing an opinion, Haigh reviewed discovery responses, the Social Security Administration decision, personal records, medical records, functional capacity evaluations, and independent medical examinations completed by Sunil Bansal, M.D., and a vocational opinion issued by Phil Davis. (Ex A) Haigh provided different assessments based on the varying medical opinions. Using Dr. Schmitz' conclusion that claimant could return to work without any restrictions on July 24, 2019, Haigh opined claimant would have a zero percent loss of access to preinjury employment options. Based on the March 31, 2020, functional capacity evaluation wherein claimant was deemed to have given maximal effort, claimant would have some access to create injury employment options despite being placed in the sedentary physical demand category. (Ex A:8-9) The same opinion was issued based on the restrictions and impairment rating set forth by Dr. Bansal. (Ex A:9)

Phil Davis, MS, CBIS, provided a vocational assessment of claimant on May 21, 2020, and then again on May 28, 2020. (CE 10-1, 10-6) Based on the FCE conducted in 2020 and the IME of Dr. Bansal, Mr. Davis determined that claimant had lost access to greater than 90 percent of all occupations within the labor market. (CE 10:5)

Claimant's past work history included working at Taco Bell preparing and serving food, parking attendant at ISU Athletic Department, assistant general manager of the Dollar General, auto cleaning, dietary aide, general maintenance at a mall, manufacturing work, installing and removing gutters, cashier work at a grocery store, and the custodial position for defendant employer. (Ex 11)

He does not believe he could do any previous positions because of the standing, walking, carrying that would be required. He has some computer experience but not in a work setting. He can email and use search engines.

Claimant has been off work since June 19, 2017. He was paid temporary total benefits from June 20, 2017, through August 11, 2019.

He testified that he believes he can be physical again given the right treatment. However, he has piercing pain that is not alleviated and still walks with a limp. He spends much of his days in a recliner.

Claimant socializes and attends tailgating parties with his friends. He has not missed a tailgating party even after his accident. His friends testified that claimant is not able to go into the stadium and watch the game but remains in the parking lot. His friends further testified that when they are with him he looks to be in obvious pain and walks slowly.

In the record are screen captures from his social media accounts that show him enjoying time with his family and friends. I do not find these photos to be evidence that he is being untruthful about the extent of his injury but also do not find them to be of high probative value that he is incapacitated by his pain. Instead, I rely heavily on the contemporaneous medical records to judge credibility. During the testimony, claimant was consistent with answers both on direct and cross examination. His recollection matched his previous testimony and the medical records without much variance. While there were notations of exaggerated pain behavior and an invalid FCE, I find that claimant was a credible witness with some tendency to exaggerate his disability and pain complaints.

The medical bills for which claimant seeks reimbursement is for treatment to the ankle and foot in December 2019 and additional EMG studies in February 2020. (CE 6)

CONCLUSIONS OF LAW

The parties agree claimant sustained an injury arising out of and in the course of his employment on June 5, 2017, when he slipped and fell resulting in injuries to his back and left leg. His care was initially conservative but resulted in a surgery on October 6, 2017, including a L4-S1 left posterior decompression and a complex discectomy at L5-S1.

The claimant seeks a finding that he is entitled to permanent benefits, temporary benefits from August 12, 2019, through May 20, 2020, the reimbursement of medical expenses itemized in Exhibit 6, and the assessment of costs. Also at issue is the appropriate commencement date for permanent partial disability benefits.

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. 6.14(6).

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).

Following the October 6, 2017, surgery, claimant reported that his pain had resolved but that his numbness had not. He repeated that he was no longer suffering from the searing pain in his first physical therapy appointment in December 2017, approximately three months following his back surgery. In the intervening time, however, he experienced a new low back pain which was triggered when he twisted while rising from the sofa. He was not able to complete the physical therapy because the pain was too great for him. In February, he saw Dr. Kaspar again for follow up on the back surgery and again reported that he had worsened after the incident in his home rising from the sofa and that there was not only numbness in his left leg but a sensation of rocks in the left shoe. New diagnostic studies were taken but showed no changes. Subsequent EMG and strength testing showed no signs of further impairment.

Dr. Boarini felt that claimant exhibited some exaggerated pain behaviors and when claimant went for an FCE, the examination could not be completed due to pain. Further evidence that claimant's pain was not as debilitating as he maintained was his behavior during the January 9, 2019, doctor's appointment with Dr. Parenteau wherein claimant was able to sit on the examination table and put his left leg up on the table with a 90-degree straight leg position without complaints of increased left leg pain. After

claimant's pain complaints did not subside, another MRI was taken which revealed stable post-surgical findings.

While Dr. Newman diagnosed claimant with lumbar radiculopathy, the EMG and MRI studies were largely normal or unchanged from his immediate post-surgical condition.

Both Dr. Boarini and Dr. Schmitz felt claimant's ongoing complaints of pain were non anatomic. Dr. Schmitz declared that there was nothing structurally to keep claimant from engaging in the activities he wanted to do. Dr. Schmitz assigned a 10 percent impairment rating for the work injury and recommended no further treatment.

Claimant's post-surgical timeline also includes the diagnosis of trench foot in the left leg. There is scant evidence that the trench foot is related to any work-related injury and the claimant has not met his burden of proof as to causation between the trench foot and the work injury. The foot specialist recommended claimant avoid lifting or carrying above 10 pounds and to avoid standing or walking. These restrictions were related to claimant's foot issue and unrelated to claimant's work injury.

In the claimant's brief, it is claimed that Dr. Sorrento found that claimant's radicular pain was from spinal nerve impingement. I do not have the same reading of the medical records. Instead, Dr. Sorrento believed that was one differential diagnosis along with the partial tear of the peroneus Brevis and claimant was sent for further testing. An EMG conducted on February 25, 2020, after the appointment with Dr. Sorrento, showed no signs of radiculopathy. Claimant also asserts that Dr. Kaspar recommended surgery. Dr. Kaspar suggested that surgery was an option but wanted to revisit it after additional testing. Additional testing including an evaluation by Dr. Fry resulted in the conclusion that claimant's pain was likely musculoskeletal in nature.

A second FCE was conducted on March 31, 2020, this time with a therapist chosen by the claimant. Claimant was able to complete this FCE unlike the previous FCE. The results of the FCE placed claimant in the sedentary physical demand category. On May 20, 2020, Dr. Bansal declared that claimant would benefit from a fusion surgery and if that failed, a spinal cord stimulator. Dr. Bansal opined that claimant sustained a 13 percent impairment of the whole body and adopted the work restrictions articulated in the March 31, 2020, FCE.

I decline to follow Dr. Bansal's opinions. He is not an orthopedic surgeon and seems to have dismissed the three MRIs and two EMGs that show no anatomic source for claimant's pain. The EMG ordered by Dr. Kitchell showed evidence of nerve damage but subsequent ones did not. Instead, I find that claimant sustained a work injury that resulted in back pain that was mostly resolved by the surgery of October 6, 2017. Symptoms remained following that surgery including numbness in the left leg along with some pain.

Intervening incidents such as the twisting while getting off the sofa and the trench foot exacerbated and/or introduced new pains and injuries from which claimant has not recovered. I find that the most reliable expert in this case is Dr. Schmitz who regularly referred claimant for treatment and testing. As a result of the reliance on Dr. Schmitz, it is found that claimant sustained a back injury with residual numbness and dysfunction. However, there was not sufficient evidence that the searing radicular pain and foot pain that claimant reported to Dr. Sorrentino was related to the work injury.

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).

Claimant was a 50 year old person at the time of the hearing. His recent work history included custodial work, as well as a variety of other tasks, most of them requiring claimant to be on his feet such as shift manager for a fast food establishment, parking attendant for the ISU Athletic Department, assistant manager of the Dollar General. Dr. Schmitz did not impose any restrictions but he did opine claimant sustained a 10 percent impairment of the whole body due to the work injury. This 10 percent impairment assessment is evidence that Dr. Schmitz believed claimant had some permanent impairment. In August 2019, defendants were prepared to provide work for the claimant within the work restrictions imposed by Dr. Sorrentino for claimant’s foot injury, which was not related to the work injury. (JE 6:12) However, that was a make work position.

At the time of the May 2019 invalid and incomplete FCE, claimant demonstrated the ability to lift and carry 5 pounds on an occasional basis and push and pull 16 pounds on an occasional basis. He had pain and numbness in the left leg, part of which is attributed to left foot pain for which claimant saw Dr. Newman and Dr. Sorrentino. The care that those two doctors provided are unrelated to the work injury.

Claimant has shown very little motivation to return to work. When offered the opportunity to perform work within the restrictions set forth by Dr. Sorrentino which is basically sedentary, claimant declined to attempt the work. Claimant is 50 years of age and most of his work experience has been in the labor field, although not necessarily

heavy labor. He has some managerial experience. His work history reveals brief stints at various places of employment and multiple jobs worked at the same time.

There is no precise mathematical basis upon which impairment is assessed. Permanent disability is a multifactorial assessment. Based on claimant's self-reported pain in the left leg, the initial EMG showing nerve impingement, the continuous complaints of numbness in the left leg following the surgery, the surgery itself, it is determined claimant has sustained a 40 percent loss of impairment. With his leg pain and numbness and low back pain, claimant would have difficulty returning to previous positions that required him to do extensive bending, lifting, and carrying. There are positions such as his assistant manager position at the Dollar Store, assembly line worker, shift manager at Taco Bell, which appear to be within his abilities when he was released from Dr. Schmitz's care in April 2019.

Dr. Schmitz set claimant's MMI date at April 10, 2019. When he saw claimant again on July 24, 2019, he released claimant from his care. There was no change in claimant's condition during the September 4, 2019, visit with Dr. Schmitz.

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

Healing period ended for claimant when he was deemed at MMI on April 10, 2019. At that time, Dr. Schmitz believed claimant's condition would not likely improve or change and it did not. Thus, the appropriate date of commencement of benefits is April 10, 2019.

Claimant seeks temporary benefits from August 12, 2019, through May 20, 2020. Claimant is not entitled to additional temporary benefits from August 12, 2019, through May 20, 2019, as there was not sufficient evidence to support a finding that his time off of work was related to the work injury.

Claimant seeks reimbursement of medical expenses. The medical visit to the UIHC and subsequent EMG were prompted by ongoing pain and discomfort in claimant's left lower extremity pain. Other than Dr. Bansal's opinion, there is no medical opinion to support a causal link between the medical condition claimant sought to have

treated in December 2019 and February 2020. Therefore, the medical expenses are not reimbursable.

Claimant also requests an assessment of costs. Rule 876 IAC 4.33 allows for the assessment costs at the discretion of the deputy. Given that claimant has prevailed in this matter, the assessment of costs against defendant employer are appropriate including the cost of the FCE and the transcript of the hearing.

ORDER

THEREFORE, it is ordered:

That defendant employer is to pay unto claimant two hundred (200) weeks of permanent partial disability benefits at the rate of two hundred ninety-nine and 05/100 dollars ($299.05), from April 10, 2019.

That defendant employer shall pay accrued weekly benefits in a lump sum.

That defendant employer shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant employer shall pay the costs of this matter pursuant to rule 876 IAC 4.33 as set forth above.

Signed and filed this _19th_ day of October, 2020.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Greg Egbers (via WCES)

Christopher Fry (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.