BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LOREN LEE PESICKA, JR.,	FILED	
Claimant,	JAN 20 2017	
vs.	WORKERS COMPENSATION	File No. 5018910
SNAP-ON LOGISTICS COMPANY a/k/a SNAP-ON TOOLS MANUFACTURING COMPANY,		REVIEW-REOPENING DECISION
Employer, Self-Insured, Defendant.		Head Note Nos.: 1802, 1803

STATEMENT OF THE CASE

Claimant, Loren Lee Pesicka, Jr., filed a petition in arbitration seeking a review/reopening of his Agreement for Settlement, which was previously approved by this agency on December 26, 2006. The hearing was held on May 18, 2016 in Des Moines, Iowa.

At the hearing, claimant, Loren Pesicka, Jr., his wife, Heather Pesicka, his daughter, Makenzie Pesicka, and his father, Loren Pesicka, Sr. each provided testimony. The evidentiary record also includes Claimant's Exhibits 1, 2, 2A, 3 and 4, most of which included numbered pages, consisting of approximately 931 pages in total. Also, included in the evidentiary record are Defendant's Exhibits A through G, consisting of 126 numbered pages. All of the exhibits were admitted without objection. When exhibits are cited below, which have been admitted in duplicate, only one exhibit number may be referenced.

Post-hearing briefs were submitted in final form and the matter was considered fully submitted on July 21, 2016.

At the hearing, the parties submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted. No factual findings or conclusions of law will be made in this decision regarding the parties' stipulations. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1) The extent of healing period benefits, if any, for the periods of: April 22, 2009 through August 4, 2009; April 21, 2010 through June 6, 2010; July 1, 2010

through July 18, 2010; October 19, 2011 through February 12, 2012; and October 21, 2015 through December 15, 2015.

2) The extent of additional permanent partial disability (PPD) or overpayment, if any.

3) Entitlement to medical expenses, consisting of claimant's spouse's lost wages incurred while transporting claimant to provider appointments.

4) Entitlement to reimbursement under section 85.39.

5) Penalty benefits.

6) Taxation of costs.

FINDINGS OF FACT

On October 3, 2002, claimant sustained a work injury to his right leg. On that date, a 30 pound steel sheet fell, landing on his right foot. (Exhibit 1, page 1; Ex. B, p. 5) On December 26, 2006, this agency approved an Agreement for Settlement entered into between claimant, Loren Pesicka, Jr., and the employer, Snap-On Tools Manufacturing Company, wherein the parties agreed that claimant sustained a 13 percent loss of the right leg, resulting in 28.6 weeks of compensation. (Ex. 1, pp. 165-166)

About 20 years before the work injury, on June 29, 1982, claimant was seen at Kossuth Regional Health, Hospital/Clinic when he was 12 years old. He had cut his foot between his 2nd and 3rd toes on the right foot with an axe. There was no tendon laceration, claimant had normal toe function with no vascular or major nerve damage. The wound was sutured. (Ex. A, pp 1-3) There are no additional records concerning the injury and no physician relates any current problem to this, now 34-year-old incident. I find that this incident has no bearing on the present matter.

At the time of this review-reopening hearing, claimant, Loren Pesicka, Jr., was 46 years old. (Ex. A, p. 1; Ex. 1, p. 1) He lives near Burt, Iowa, with his spouse, Heather Pesicka, to whom he has been married for 20 years. (Transcript pp. 16-17) Claimant's daughter, Makenzie Pesicka, is 19 years old, and had lived with claimant until August 2015, when she moved out to go to college. (Tr. p. 53) Claimant's father, Loren Pesicka, Sr., lives nearby in Algona, Iowa. (Tr. p. 33) Mr. Pesicka, Sr., is a truck driver and is home on the weekends, when he often spends time with his son, the claimant. (Tr. p. 34)

Claimant had 11 surgeries concerning this work injury. (Tr. p. 55) Of those 11 surgeries, 8 have occurred after the 2006 settlement, with the final 2 surgeries resulting in the amputation of all 5 toes on his right foot. (Ex. 2, pp. 10, 16-18, 39-41, 51-52, 73-74, 81-82, 100-103, 322-323)

Prior to the 2006 Agreement for Settlement, claimant had undergone three surgeries on his right foot. On May 26, 2004, Mark Hartman, D.P.M. performed a Lapidus fusion. (Ex. 1, pp. 20-24) After this procedure, a screw that had been used in the fusion broke, which led to a follow-up surgery on September 29, 2004, with Dr. Hartman. (Ex. 1, pp. 69-71) The second surgery involved removal of some of the hardware, debridement, and revision of the fusion, using a bone graft harvested from claimant's right tibia. (Id.) Later examination revealed nonunion of the fracture and on March 23, 2006, claimant underwent a third surgery to remove additional hardware, debride the area and install additional bone grafting using bony putty. (Ex. 1, pp. 104-105)

On June 3, 2005, before the third surgery, Dr. Hartman issued a letter to the workers' compensation insurance administrator stating that claimant had excellent strength, with some sensory loss, but no motion at the fusion site. (Ex. 1, p. 93) Dr. Hartman assigned a permanent impairment rating of five percent to the lower extremity. There was no assignment of permanent restrictions. (Ex. 1, pp. 93-94)

On September 28, 2006, claimant was seen by Dr. Hartman who noted that claimant "has had no pain or discomfort and has been ambulating normally." (Ex. 1, p. 137) However, he then stated that "he still is not putting his entire weight on the front portion of the foot secondary to some degree of apprehension." (Id.) Also, Dr. Hartman stated that claimant was still using a CAM boot for approximately half of the day. (Id.)

Also, on September 28, 2006, claimant was seen by John Kuhnlein, D.O. at the request of claimant's attorney. (Ex. 1, p. 139) Dr. Kuhnlein found that claimant walked primarily using the lateral aspect and heel of his right foot and declined walking on his toes due to apprehension. Dr. Kuhnlein further found that claimant had three screws in his foot, with the longest being bent, there was an incomplete bony fusion between the navicular and medial cuneiform and his range of motion in degrees was as follows:

	Right	Left
Dorsiflexion	20	20
Plantar Flexion	40	40
Inversion	20	20
Eversion	5	20

(Ex. 1, p. 149) At the conclusion of the examination, Dr. Kuhnlein assigned a 13 percent lower extremity impairment rating and assigned restrictions as follows:

Limitation	Frequent	Occasional	Rare
Lift/Push/Pull, Floor to Waist		30 pounds	
Lift Waist to Shoulder		40-50 pounds	
Over the Shoulder		30 pounds	

Additional Restrictions: sit/stand/walk occasionally, change positions as needed for comfort; stoop/bend occasionally; crawl frequently; kneel frequently; no work off

ground levels on ladders; may go up and down stairs without restriction, but might use a tandem gait; and, he should wear good fitting footwear with arch supports. (Ex. 1, p. 151)

On November 17, 2006, David Berg, D.O., sent a letter to defense counsel concerning an independent medical evaluation (IME) of claimant. (Ex. E, p. 45) Dr. Berg questioned the causal connection between claimant's condition and his original work injury. Nevertheless, he assigned an eight percent impairment to the right lower extremity and affirmatively stated that he would not place any work restrictions on claimant because of the ongoing care with Dr. Hartman, which would render any restrictions "premature at best." (Ex. E, p. 46)

On December 21, 2006, Dr. Hartman saw claimant who reported he was "increasing his activities without any significant increases in pain or discomfort." (Ex. 1, p. 162) He found that there was "clinical stability at the arthrodesis site. There are no gross regions of tenderness or pain on palpation or manipulation." (Id.) After x-rays were obtained, Dr. Hartman noted "some failure" of the longest screw. (Ex. 1, p. 163)

Since the Agreement for Settlement was approved by this agency on December 26, 2006, claimant has continued to receive medical treatment. He has had eight additional surgeries after the 2006 settlement. (Ex. 2, pp. 10, 16-18, 39-41, 51-52, 73-74, 81-82, 100-103, 322-323)

However, before any additional surgery had occurred, but after the settlement was approved, Dr. Hartman assigned a permanent impairment rating of 19 percent to claimant's lower extremity on June 27, 2007. (Ex. 2, Part 2, p. 5) This was provided in response to a request from the employer's workers' compensation administrator. (Id.)

On July 10, 2008, claimant was seen by Michael B. Scherb, M.D., who documented that claimant had broken screws in his foot as well as a long screw that was bothering him. (Ex. 2, Part 1, pp. 6-7)

Then on July 24, 2008, claimant proceeded to surgery with Dr. Scherb for the removal of the distal portion of the long screw that had been bothering him. (Ex. 2, Part 1, p. 10)

On April 22, 2009, claimant underwent a revision arthrodesis surgery. (Ex. 2, Part 1, pp. 16-17) This surgery was performed by Joseph Galles, Jr., M.D.

On July 9, 2009, Dr. Galles noted at a follow-up appointment that claimant was "pain free" and was "doing a nice job remaining off the right foot." (Ex. 2, Part 1, p. 25)

However, in September 2009, claimant reported stabbing, sharp pain in his foot. (Ex. 2, Part 1, p. 30) It was noted that claimant had painful hardware and had developed metatarsalgia and pain with ambulating. This led to surgery on April 21,

2010. At that time, Dr. Galles performed a third and fourth metatarsal osteotomy, a Weil osteotomy and removal of additional hardware. (Ex. 2, Part 2, p. 39)

Again, the hardware was causing problems and on July 10, 2010, claimant underwent another surgery with Dr. Galles for the removal of a screw. (Ex. 2, Part 1, p. 51)

On January 1, 2011, claimant was seen by Timothy C. Fitzgibbons, M.D. of Gikk Ortho Specialists for the purpose of an independent medical examination, which was arranged by the employer through the nurse case manager. (Ex. 2, Part 1, p. 61) Dr. Fitzgibbons found that "the injuries and all of the surgeries and all of the dystrophic component and all of the symptoms that the patient have [*sic*] now were caused by an injury that occurred at work in approximately 2002." (Ex. 2, Part 1, p. 63) In addition, Dr. Fitzgibbons found that claimant was not yet at maximum medical improvement (MMI). (Ex. 2, Part 1, p. 64)

On October 19, 2011, Dr. Galles performed surgery in a procedure described as: "correction of right forefoot claw deformities," which also included "interphalangeal joint fusions of toes 2, 3, 4, and 5." (Ex. 2, Part 1, p. 73)

Noting that claimant had "developed wound breakdown and also dysvascular changes," just a few weeks later, on November 2, 2011, Dr. Galles did another surgery, which was an irrigation and debridement of the right forefoot wounds with pin removal of toes two and three. (Ex. 2, Part 1, p. 81)

In December, 2011, claimant had a worsening infection of the right forefoot "centered around the necrotic-appearing 3rd toe that has not improved in appearance and now the 4th toe is somewhat erythematous and more swollen." (Ex. 2, p. 96) On January 5, 2012, claimant proceeded to surgery with Dr. Galles for the amputation of his 3rd, 4th, and 5th toes, with irrigation and debridement of the forefoot. (Ex. 2, Part 1, p. 102)

On September 15, 2015, it is recorded that claimant "continues to have chronic pain related to his remaining digits but also has pain related to transfer metatarsalgia." (Ex. 2, Part 2, p. 305) The decision was made to pursue amputation of the remaining two digits on the right foot, with the understanding that "it is impossible to predict the exact level of function he will have after such a surgery." (Id.)

On October 21, 2015, Dr. Galles performed surgery involving the amputation of the first and second toes. (Ex. 2, Part 2, p. 322)

On April 15, 2016, claimant was examined by Joshua D. Kimelman, D.O., orthopedic surgeon. (Ex. 2, Part 2, p. 367) At that time, claimant indicated that he was "better today than he was prior to his operation, but he continues to improve. He does have some phantom limb pain after the amputation of the first and second toes, but nothing compared to the magnitude of the pain that he had after the amputation of his

third, fourth and fifth toes." (Ex. 2, pp. 368-369) Claimant reported his pain level as 4/10 on an average day. (Ex. 2, Part 2, p. 369)

Regarding medication, claimant advised that he had left over hydrocodone from his last surgery and he takes one or two pills per month as well as taking one or two Aleve pills per week. (Id.) He also takes a baby aspirin daily, which he has done since the deep vein thrombosis (DVT) issue arose after the first surgery in 2004. (Id.) On examination, Dr. Kimelman found that claimant walks with his foot externally rotated on the lateral portion of his right foot. He was noted to have a "loss of normal heel-toe off mechanics with some decreased sensation over the dorsum of the foot and residual discomfort in metatarsal head with amputations of all 5 toes." (Id.) Dr. Kimelman stated that x-rays showed "a stable first metatarsal tarsal fusion." (Id.)

Dr. Kimelman was asked to provide "a permanent impairment to his right foot as a result of the October 3, 2002, injury and any conditions that subsequently developed therefrom." (Ex. 2, Part 2, p. 370) In response thereto, he assigned permanent impairment of 30 percent to the right lower extremity based on the findings of dysesthesia and amputation of the toes. (Ex. 2, Part 2, p. 370) Therefore, Dr. Kimelman concluded that the amputations are causally related to the original work injury.

Dr. Kimelman then assigned a generalized restriction stating that: "he is restricted in climbing and descending stairs and also in the amount of ambulation that he can perform." (Ex. 2, Part 2, p. 371) Dr. Kimelman does not specify the particulars of the restrictions assigned, concerning time or distance.

On February 2, 2016, claimant was examined by Dr. Kuhnlein at the request of his attorney. (Ex. 2, Part 2, p. 372) On April 19, 2016, Dr. Kuhnlein issued his report. (Id.) He noted claimant's reported symptoms of plantar foot pain, more lateral than medial, which is activity dependent, along with metatarsal pain with ambulation and phantom pain that has been decreasing. His pain was usually in the 4-5/10 range. (Ex. 2, Part 2, p. 379) He reported to Dr. Kuhnlein that he was working without restrictions, other than to sit as needed, which the employer is accommodating. (Id.) Upon physical examination of claimant, Dr. Kuhnlein found, among other things, that claimant's ankle range of motion in degrees was as follows:

	Right	Left
Dorsiflexion	15	15
Plantar Flexion	40	40
Inversion	20	20
Eversion	20	20

(Ex. 2, Part 2, p. 382) This represents a reduction in dorsiflexion and a gain in eversion compared to Dr. Kuhnlein's 2006 evaluation. X-rays revealed "[t]wo threaded screws across the first metatarsal with fusion were noted as were amputations of all the toes." (Id.)

The absence of claimant's toes is an obvious difference from Dr. Kuhnlein's 2006 evaluation. He went on to state that the assignable permanent impairment under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, had "clearly increased" since the time of the settlement, "which makes sense based on the amputation of all the toes with phantom pain in the context of the fusion of the tarsometatarsal joint." (Ex. 2, Part 2, pp. 384-385) Dr. Kuhnlein assigned an impairment rating of 25 percent to the lower extremity. (Id.) In doing so, I find that Dr. Kuhnlein has clearly taken into consideration the amputation of claimant's toes when assessing the functional impairment and considered the same to be related to the original injury. Dr. Kuhnlein further stated that "[g]iven the condition of the foot when I saw him in 2006, there has clearly been a material change in the condition of the foot related to the original October 3, 2002 injury. When I saw him in 2006, the toes had not been amputated." (Ex. 2, Part 2, p. 383)

Turning to the question of permanent restrictions, Dr. Kuhnlein assigned the following permanent restrictions, in the event that the company no longer allows him to sit as needed, or if he should change jobs:

Limitation	Frequent	Occasional	Rare
Lift Floor to Waist		30 pounds	
Lift Waist to Shoulder		50 pounds	
Lift Over the Shoulder		30 pounds	

Additional Restrictions: sit/stand/walk occasionally, changing positions as needed for comfort; stoop/bend occasionally; crawl frequently; kneel frequently on the right knee because of the amputations; due to amputations, no work off ground level on ladders or scaffold; can go up and down stairs without limitation, but may still use tandem gait; no operation of foot operated machinery; he can drive a vehicle; and, he should wear good fitting shoes with appropriate inserts. (Ex. 2, Part 2, p. 385) Dr. Kuhnlein stated that his intent was that "[t]he only changes in the right foot restrictions since I saw him in 2006 relate to machine operation." (Ex. 2, Part 2, p. 385)

Heather Pesicka, claimant's wife, testified that in 2006, claimant's right leg was functioning "pretty good." (Tr. p. 18) She stated that in 2006, claimant was able to waterski and go bowling and regularly enjoyed dancing. (Id.) Mrs. Pesicka believed that claimant was in "a little bit" of pain in 2006, based on her observations. (Tr. p. 20) Since 2006, Mrs. Pesicka has observed that claimant does not stand on his right leg as much as he did before, and that he shows signs of fatigue more quickly concerning the right leg. (Tr. pp. 21-22) In addition, she testified that the distances that claimant is able to walk have been reduced and he engages in leisure activities such as camping, dancing and four-wheeling less than he did in 2006. (Tr. p. 22) She also testified that claimant has not bowled at all since 2006. (Tr. pp. 23, 25) Although she testified initially that claimant has not danced since 2006, upon cross-examination she admitted

that claimant has danced since the settlement in 2006, but has done so only a couple of times per year. (Tr. pp. 23, 25)

In addition to the above described activities, claimant has been involved in automobile dirt track racing for over 20 years, which he has continued since 2006. (Tr. pp. 22-23, 94) Claimant races International Motor Contest Association (IMCA) modified cars and plans to continue racing in the future, although with less frequency. (Tr. pp. 23-24 & 62) In the past, claimant raced about 40 times per season. (Tr. p. 23; Ex. F, p. 47) Since 2006 he has raced fewer times per year and now races about 10 times per season. (Tr. pp. 23, 61; Ex. F, p. 47) Claimant uses both feet to drive the car. (Ex. F, p. 47)

Heather Pesicka also testified that she drove claimant to a number of medical appointments, including surgeries, because he was unable to drive himself. (Tr. p. 28) She testified that she drove her husband to medical appointments about 18 times from 2009 to the time of the hearing. (Id.) Claimant testified that the times that Mrs. Pesicka drove him to appointments when she was not working, were not included in the total of 18 trips. (Tr. pp. 78-79) Mrs. Pesicka stated that these times of transporting her husband while she otherwise would have been working, caused her to lose wages. She was earning between $10.79 per hour to $10.95 per hour at the time. (Tr. p. 29) Her employer, the Algona Community School District, does not provide her with paid time off, and therefore she took those days off without pay. (Tr. p. 30) She also stated that she incurred between 15 to 18 separate meal expenses in an average amount of about $10.00 per meal. (Tr. p. 29) She did not have any receipts for the meals or any documentary evidence to support her hourly wage, days worked or number of hours missed. (Tr. p. 31)

The 18 trips described by Mrs. Pesicka, which occurred over a 7 year period amounts to a little over 2.5 times per year, and is reasonable given claimant's extensive surgical and medical history. It is clear that Mrs. Pesicka's testimony is based on her best sincere guess regarding the number of trips and meals, and cost of those meals. There was no evidence contrary to Mrs. Pesicka's testimony.

Although Mrs. Pesicka testified that she took time off work, it is unclear to the undersigned if she took off an entire shift for each trip, and the number or hours that Mrs. Pesicka normally worked in a shift. Both claimant and Mrs. Pesicka testified that there were no conversations with the employer about the specifics of how claimant was to be transported to his medical appointments when he was unable to drive. (Tr. pp. 3-31, 81) The undersigned concludes that not every trip would have been for a surgery and therefore, the majority would more likely than not, have involved an office visit. Considering the distance to be traveled, and the fact that the majority of visits would have been for something other than surgery, the undersigned finds that an average loss of 7 hours of paid work for Mrs. Pesicka per trip is appropriate. Further, the undersigned concludes that Mrs. Pesicka's average wage for the period of time in question, based on her testimony was $10.87 ($10.79 + $10.95/2 = $10.87). Seven (7) hours multiplied by $10.87 is $76.09. This amount per trip of $76.09, multiplied by

18 trips is $1,369.62. Concluding that claimant incurred 15 meal expenses (the lower of her two estimates) and allowing $10.00 per meal, creates a total meal expense of $150.00 (Tr. p. 29) The lost hourly wage of $1,369.62 plus the meal expense of $150.00 totals $1,519.62.

The evidence indicates that there were undoubtedly times when claimant would have been unable to drive himself to and from certain medical appointments and the employer made no particular arrangements for his transportation. Claimant's spouse did what spouses do, and took time off work, unpaid, and transported claimant to his appointments. There was no evidence presented that there was any other more economically reasonable way for claimant to be transported to the medical appointments. I find that Mrs. Pesicka's transportation of claimant on 18 occasions, incurring 7 hours of averaged lost wages at an average hourly wage of $10.87, and incurring 15 meal expenses averaging $10.00 per meal, was the most economically reasonable way to transport claimant to those 18 medical appointments. I further find that the quality and quantity of the services rendered by Mrs. Pesicka was reasonable and that the wages herein reimbursed were actually lost by Mrs. Pesicka, pursuant to her testimony.

Makenzie Pesicka, claimant's 19-year-old daughter, testified that she was 9 years old in 2006 when the Agreement for Settlement was approved by this agency. (Tr. p. 49) She stated that she recalls her father being more active in 2006 than he is now, enjoying activities with the family, including long bike rides, swimming, boating and tubing. (Tr. p. 50) Since 2006, Makenzie stated that her father takes longer to get things done, like mowing the yard. (Tr. p. 51) She also stated that he no longer plays tag with her in the yard, but denied that this has anything to do with the fact that she is now 19 years old, not 9 years old. (Tr. p. 54-55) The undersigned finds it highly likely that Makenzie's increasing age and the natural maturing of the father/child relationship is a substantial factor in the reduction of episodes of playing tag.

Claimant's father, Loren Pesicka, Sr. (hereinafter "Mr. Pesicka"), testified that he lives in Algona, Iowa and previously lived on the acreage near Burt, Iowa, where the claimant was raised and where he now lives. (Tr. pp. 33-34) Mr. Pesicka has been a truck driver since about 1986 and is usually home on the weekends, when he sees his son, the claimant. (Id.) Mr. Pesicka described the condition of his son's right leg in 2006 as being in "pretty bad shape" and "kept getting worse" thereafter. (Tr. pp. 34-35) He stated that his balance has gotten worse, walking has become more difficult, he takes breaks and needs to sit down more often than before 2006, and he now walks with a limp that he did not have in 2006. (Tr. pp. 36-38) Mr. Pesicka testified that presently, claimant was still camping, racing cars, working on cars and trucks and helping around the acreage. (Tr. pp. 42-43) Although, he now takes more breaks while doing so. (Tr. p. 40) Claimant also continues to operate a skid loader and a tractor. (Tr. pp. 43-44)

Claimant, Loren Pesicka, Jr., testified that he has had restrictions in the past, but that he understood that his current restriction is "rest as needed," per Dr. Joe Galles.

(Tr. p. 58) However, he advised Dr. Kuhnlein, claimant's IME physician, that he last saw Dr. Galles on January 11, 2016, and that he was returned to full-duty at claimant's request. He also stated that he was not sure if the sitting restrictions were still in place, but that his supervisor allows him to sit as needed. (Ex. 2, part 2, p. 379) He testified that when he was on temporary restrictions he was not allowed, by company policy, to work overtime. (Tr. p. 63) However, he is now working full-time, including overtime and at a similar number of hours as before. (Tr. p. 26, 63; Ex. F, p. 8) He has earned regular wage increases since the injury in 2002. (Tr. p. 64)

Claimant testified that when his foot is hurting at work, he is able to go to his toolbox, where he can rest his foot, but yet still perform work on other projects. (Tr. p. 59) He rests his foot while at his toolbox for about one or two hours per day. (Tr. p. 60) Sometimes up to three hours during the shift. (Ex. F, p. 13) His supervisor has been cooperative in letting claimant do some work in a sit-down position to rest his foot. (Tr. p. 61)

Claimant continues to maintain a side job of snow removal for commercial customers. (Ex. F, p. 14) To do this job he operates a truck with a snow blade, a four-wheeler with a snow blade, a skid loader and a snow blower. (Id.) He also continues to work on race cars for himself and friends. (Ex. F, p. 15) Although he stated that he does not make any money working on race cars and does it because he enjoys it. (Id.)

Concerning his current symptoms, claimant testified that he has increased sensitivity at the end of his right foot where his toes were. Any touch can cause discomfort. Even having a blanket on that part of his foot bothers him. (Tr. pp. 70-71; Ex. 2, Part 2, p. 126) In addition he still has phantom pain in the area of the amputated toes. His foot is never pain free and it occasionally wakes him up from sleep. (Tr. pp. 71-72) Claimant described difficulty pushing/pulling and doing overhead work, which he relates to putting pressure on his foot to push off and/or maintain balance. (Tr. p. 73) He sometimes takes Aleve to address the pain, which can extend into his right hip and back, although no physician has given any impairment rating or restrictions related to the hip or back. (Tr. p. 65)

Claimant maintained a journal beginning in January 2012 after the surgery resulting in the amputation of his third, fourth and fifth toes. (Ex. 2, Part 2, p. 104; Tr. p. 68, 82-83) In the journal, claimant describes his frustrations with losing his toes and his struggles to relearn activities with reduced balance, and describes good days and bad days related to his pain levels. (Ex. 2, Part 2, pp. 106, 109, 114, 123, 128, 166) He also describes his experiences with physical therapy and enjoying some improvement. (Ex. 2, Part 2, p. 180) Claimant recorded some of the more simple pleasures, like finding that he could still wear flip flops. (Ex. 2, Part 2, p. 182) This was, of course, before his final surgery when he lost his final two toes. Through August and into September, 2012, claimant described a fair number of good days and at that time, he was enjoying some relative success in auto racing. (Ex. 2, Part 2, pp. 190-191, 197-200) He also described easier days at work and harder days that would increase his pain and sometimes made his foot feel very swollen and tight, like a "basketball

inside a baseball." (Ex. 2, Part 2, unnumbered p. 261) The journal continued through March 2015, with claimant continuing to describe the ups and downs of his job, his concerns about his pain, and his symptoms in his foot. (Ex. 2A)

Claimant testified that he continues racing cars and he has made some modifications to his race car to give himself better control and reduce fatigue. Those modifications have included installing a support for his right leg and installing an accelerator pedal that is hinged on the floor. (Tr. pp. 61-62) He is able to go up and down stairs at work. (Tr. p. 67) He described the symptoms in his foot as sensitivity, numbness and pain in the arch area. In addition, his heel gets tender from walking on it, and he continues to have phantom pain. (Tr. pp. 70-71)

It is clear claimant has experienced a change in his physical condition since the 2006 settlement. The most obvious is the amputation of all of his toes on his right foot. Therefore, I find that claimant has met his burden of proof by establishing by a preponderance of the evidence, a worsening of his physical condition and related increase in impairment. I further find that based on the opinions of Dr. Kimelman and Dr. Kuhnlein that the above change in condition is causally related to the original work injury. (Ex. 2, p. 370 & Ex. 2, pp. 383-384)

Considering claimant's percentage of functional loss, I note that Dr. Hartman assigned 19 percent impairment to the lower extremity on June 27, 2007, and Dr. Galles assigned 17 percent to the lower extremity on February 8, 2013. Both of these occurred prior to claimant's final surgery in October, 2015 and occurred years before the review-reopening hearing. (Ex. 2, Part 1, p. 5; Ex. 2, Part 2, p. 233; Ex. 2, part 2, pp. 322-323) Because neither of the above reviewed claimant's condition after the most recent surgery and were significantly remote in time, I do not assign them any weight.

Two more recent impairment ratings have been assigned by Dr. Kimelman on April 15, 2016 and by Dr. Kuhnlein on April 19, 2016. (Ex. 2, Part 2, pp. 367-371 & 372-388)

Dr. Kimelman evaluated claimant on April 15, 2016 and assigned impairment to the lower extremity of 10 percent for the fusion and loss of heel-toe transfer; 5 percent due to dysesthesia; 12 percent for the amputation of the big toe; and, 2 percent each for amputation of the remaining 4 toes, for a total of 30 percent to the lower extremity. (Ex. 2, Part 2, p. 370)

Dr. Kuhnlein evaluated claimant on February 2, 2016 and assigned impairment to the foot of 5 percent for the fusion; 31 percent for the amputation of all 5 toes; and 3 percent for the phantom pain. (Ex. 2, Part 2, p. 384) Dr. Kuhnlein combined these ratings for the foot, and converted them to a lower extremity rating, arriving at an impairment to the right lower extremity of 25 percent. (Id.)

Dr. Kuhnlein's report indicates that the claimant's altered foot gait including walking supinated, on the lateral aspect of his right foot is "more by habit then [*sic*]

because of pain." (Ex. 2, Part 2, p. 384) This is a factor that Dr. Kimelman did not consider. In addition, Dr. Kuhnlein assigned impairment for the phantom pain under chapter 18 of the AMA Guides, which I find appropriate under these facts, because the impairments under the AMA Guides for amputation do not capture phantom pain. I therefore find more persuasive and accept the opinion of functional impairment assigned by Dr. Kuhnlein, which is 25 percent of the right lower extremity.

Claimant's spouse testified that she considered claimant to have sustained a 45 to 50 percent loss of function based on her observations. (Tr. pp. 29-30) This opinion was provided as a statement of conclusion without a persuasive basis. Mrs. Pesicka testified that claimant still goes camping, dances, rides 4-wheelers and works for the defendant full-time, including overtime, although his leisure activities have been reduced. (Tr. pp. 23-25) In addition claimant still drives an IMCA Modified dirt track race car, although less often than before and with minor modifications. (Tr. p. 26)

Claimant's father testified that he estimated claimant sustained a 50 percent loss of function with his right leg based on his observations. (Tr. p. 46) Mr. Pesicka, Sr. stated that claimant still goes camping, works on trucks and race cars, works on the acreage, operates a tractor and a skid loader, and continues to race cars. (Tr. pp. 41-45) Mr. Pesicka Sr. stated that claimant requires more rest during these activities than he did before. Mr. Pesicka's assessment of permanent impairment was not found to be persuasive to the undersigned.

I find that claimant has sustained a 25 percent functional loss as stated by Dr. Kuhnlein.

Claimant seeks healing periods as follows: April 22, 2009 - August 4, 2009 (15 weeks); April 21, 2010 – June 6, 2010 (6 weeks, 5 days); July 1, 2010 – July 18, 2010 (2 weeks, 4 days); October 19, 2011 – February 12, 2012 (16 weeks, 5 days); and October 21, 2015 – December 15, 2015 (8 weeks). Total healing period sought by claimant is 49 weeks.

Defendant's Exhibit C, pages 10 and 11 shows that weekly benefits were paid to claimant for the above periods of time. (Ex. C, pp. 10-11) This is corroborated by claimant's testimony that he received weekly payments while he was off work when the doctor took him off work. (Tr. pp. 87-88)

However, the parties have stipulated per the hearing report to a weekly rate of $435.40. (Hearing Report, p. 1) Defendant agrees that the rate actually paid to claimant for the above healing periods was underpaid by $12.04 per week. (Defendant's Post-Hearing Brief, p. 5) Defendant does not argue that there is a reasonable basis for the underpayment, and I find that no such reasonable basis exists. The underpayment of $12.04 multiplied by the healing period in question of 49 weeks is $589.96. Fifty (50) percent of that amount is $294.98. Claimant is entitled to payment of the healing period underpayment of $589.96 and 50 percent penalty on that amount of $294.98.

The Agreement for Settlement approved on December 26, 2006, shows that the parties agreed to permanent partial disability of 13 percent impairment to the right leg, resulting in 28.6 weeks of permanency benefits. (Ex. 1, p. 165)

After the settlement was approved, claimant received additional benefits since December 2006. The parties are in substantial agreement regarding the benefits paid to claimant after December 2006. This conclusion is reached by comparing the "Claimant's Itemization of Compensation Payment by the Defendant," attached to the hearing report and referenced therein by claimant, and Defendant's Exhibit C, pages 10 and 11. However, significant portions of those benefits were paid as healing period benefits. I find that the payment record submitted by the defendant is the most accurate and from that I determine that claimant has been paid additional permanent partial disability benefits of 57.5 weeks as follows:

Date	Amount	No. of Weeks	Total Weeks
May 1, 2013	15,876.00	37.5	37.5
February 8, 2016	3,386.88	8 weeks	45.5
February 19, 2016	423.36	1 week	46.5
February 22, 2016	423.36	1 week	47.5
February 22, 2016	423.36	1 week	48.5
February 29, 2016	423.36	1 week	49.5
March 7, 2016	423.36	1 week	50.5
March 14, 2016	423.36	1 week	51.5
March 21, 2016	423.36	1 week	52.5
March 28, 2016	423.36	1 week	53.5
April 4, 2016	423.36	1 week	54.5
April 11, 2016	423.36	1 week	55.5
April 18, 2016	423.36	1 week	56.5
April 25, 2016	423.36	1 week	57.5

(Ex. C, pp. 10-11)

However, as with the healing period benefits described above, I note that the weekly benefits were paid at the rate of $423.36 weeks, which is $12.04 less than the parties stipulated rate of $435.40 as set forth in the hearing report.

I have found above that claimant has sustained 25 percent functional impairment. Claimant is therefore entitled to 55 weeks of permanency benefits.

Claimant was paid 57.5 weeks of benefits, or 2.5 weeks more than his functional loss. This overpayment of 2.5 weeks multiplied by the weekly rate of $435.40 is $1,088.50.

Although claimant was underpaid $12.04 per week for 55 weeks of permanency benefits at the improper rate of $423.36, which creates a total PPD underpayment of

$662.20, claimant was overpaid $1,088.50 as stated above and is therefore entitled to no additional PPD benefits.

However, the fact remains that claimant was underpaid each week when the PPD benefits were due for a total of $662.20 and the additional 2.5 weeks added to the end does not provide the requisite reasonable excuse to avoid penalty for the underpayment. I therefore conclude that claimant remains entitled to penalty benefits for the underpayment of $662.20, and that a 50 percent penalty is appropriate, which equals $331.10. Defendant shall pay claimant penalty benefits for PPD underpayment of $331.10.

Claimant seeks reimbursement of an independent medical examination performed by Dr. Kuhnlein on February 2, 2016. Dr. Kuhnlein issued his report on April 19, 2016. (Ex. 2, Part 2, p. 372) This exam occurred after Dr. Hartman issued an opinion on June 27, 2007, at the request of the workers' compensation insurance administrator, in which he concluded that claimant sustained a 19 percent permanent impairment to his lower extremity. (Ex. 2, Part 1, p. 5) Also, on January 11, 2011, Dr. Fitzgibbons issued a report following an evaluation in which it was determined that claimant was not yet at MMI. This evaluation was arranged by the nurse case manager, Ms. Jane Klein. (Ex. 2, Part 1, p. 61) Finally, on February 8, 2013, the treating physician, Dr. Galles, issued an opinion letter to Ms. Jane Klein that claimant sustained a 17 percent permanent impairment to his lower extremity. (Ex. 2, Part 2, p. 233) Clearly, the opinion of Dr. Kuhnlein post-dated multiple opinions issued by physicians retained by the employer concerning evaluations of permanent disability.

The invoice for Dr. Kuhnlein's exam and report totals $5,321.90. (Ex. 2, Part 2, p. 393) The undersigned notes that this is a review/reopening dating back to an original work injury of October 3, 2002, and that Dr. Kuhnlein reviewed 1,860 pages of medical records. (Ex. 2, Part 2, p. 387) It uncontroverted that claimant has a substantial medical history with 11 total surgeries. I find that the amount which may otherwise be high, is reasonable under the particular circumstances of this case.

CONCLUSIONS OF LAW

The first issue is the extent of healing period benefits, if any, for the periods of: April 22, 2009 through August 4, 2009; April 21, 2010 through June 6, 2010; July 1, 2010 through July 18, 2010; October 19, 2011 through February 12, 2012; and October 21, 2015 through December 15, 2015.

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, 312

N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

I have found above that claimant has been paid, albeit underpaid for the dates in question. Claimant was underpaid healing period benefits in the amount of is $589.96 and claimant is entitled to the same with appropriate interest.

The second issue is the extent of additional permanent partial disability or overpayment, if any, concerning the stipulated right leg injury concerning the review-reopening and any applicable credit thereto.

Iowa Code section 86.14(2) provides: "[i]n a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon."

In a review-reopening, "[t]o justify an increase in compensation benefits, the claimant carries the burden of establishing by a preponderance of the evidence that, subsequent to the date of the award under review, he or she has suffered an impairment or lessening of earning capacity proximately caused by the original injury." Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999).

The Supreme Court stated in Kohlhaas v. Hog Slat, Inc., "The review-reopening claimant need not prove, as an element of his claim, that the current extent of disability was not contemplated by the commissioner (in the arbitration award) or the parties (in their agreement for settlement)." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

The Supreme Court also stated in the case of Kohlhaas v. Hog Slat, Inc., that:

> A compensable review-reopening claim filed by an employee requires proof by a preponderance of the evidence that the claimant's current condition is "proximately caused by the original injury." See Simonson, 588 N.W.2d at 434 (original emphasis omitted) (quoting Collentine,525 N.W.2d at 829). While worsening of the claimant's physical condition is one way to satisfy the review-reopening requirement, it is not the only way for a claimant to demonstrate his or her current condition warrants an increase of compensation under section 86.14(2). See Blacksmith v. All–Am., Inc., 290 N.W.2d 348, 354 (Iowa 1980) (holding a compensable diminution of earning capacity in an industrial disability claim may occur without a deterioration of the claimants physical capacity).

Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

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).

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

I have found above that claimant has sustained a change in condition to his right lower extremity that is related to the original injury since the Agreement for Settlement was approved by this agency on December 26, 2006, and that the condition has worsened since that time.

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

Lay testimony of functional loss was provided by the witnesses. The undersigned has considered this testimony relating to the extent of functional loss along

with the remaining evidence, including the expert opinions and determined that, for the reasons stated above, the impairment rating assigned by Dr. Kuhnlein of 25 percent permanent impairment to the right lower extremity is the most persuasive and I have accepted the same. I conclude that claimant has sustained a 25 percent functional loss to the right lower extremity, which is equivalent to 55 weeks of permanent partial disability benefits.

I have found above that defendant has paid 57.5 weeks of permanent partial disability benefits since 2006. Claimant takes no additional permanent partial disability benefits.

The third issue is entitlement to medical expenses, consisting of claimant's spouse's lost wages incurred while transporting claimant to provider appointments.

Iowa Code section 85.27 provides:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.

Iowa Code section 85.27(1). The Iowa Supreme Court has considered the issue of spousal lost wages in the case of Mycogen Seeds v. Sands, 686 N.W.2d 457 (Iowa 2004). In this case, the Court refers to a Florida case interpreting a similar statute in which a claimant's husband drove the claimant to medical appointments and sought reimbursement for the husband's lost wages he incurred, and stated as follows:

> Therefore, lost wages can qualify as a reimbursable cost but only if the manner of travel was the most economical reasonable way to be transported, the amount was reasonable as to the quality and quantity of services rendered, and the wages were actually lost by the person providing the transportation.

Mycogen Seeds v. Sands, 686 N.W. 2d at 468-469, citing Mills v. Walden-Sparkman, Inc., 493 So.2d 64, at 66 (Fla. Dist. Ct. App. 1986). In the case at bar, claimant's spouse provided uncontroverted testimony that she lost wages as a result of transporting claimant to medical appointments when he was unable to drive himself. There was no evidence that defendant offered or discussed transportation with claimant. I found above that claimant's spouse taking time off work to transport claimant was economically reasonable and that the amount was reasonable considering the quality and quantity of services provided. I further found and conclude that Mrs. Pesicka actually incurred said wage loss. It is appropriate for defendant to reimburse claimant for Mrs. Pesicka's lost wages and meal reimbursement in the sum of $1,519.62.

The fourth issue for determination is entitlement to reimbursement under Iowa Code section 85.39.

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

Defendant is responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

I have found above that the evaluation and report prepared by Dr. Kuhnlein were conducted and prepared after more than one physician retained by the employer had expressed opinions on the issue of permanent disability. I have further found that under the particular circumstances of this case, the fee charged by Dr. Kuhnlein was reasonable. Defendant shall reimburse claimant for the cost of Dr. Kuhnlein's independent medical examination and report in the sum of $5,321.90.

The fifth issue for determination is whether penalty benefits are appropriate.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Considering the underpayment of weekly benefits, I have found that the parties have stipulated per the hearing report to a weekly rate of $435.40. (Hearing Report, p. 1) I have further found above that there was no reasonable basis for the underpayment of both permanent partial disability and healing period benefits. The healing period underpayment is $589.96. The permanent partial disability underpayment is $662.20. I have found above that a 50 percent penalty is appropriate.

Therefore, I have concluded that defendant shall pay claimant penalty benefits of $294.98 for underpayment of healing period and $331.10 for underpayment of permanent partial disability benefits, for a total penalty award of $626.08.

The final issue is taxation of costs.

Assessment of costs is a discretionary function of this agency pursuant to Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. Rule 876 IAC 4.33. I conclude that claimant was successful in the majority of issues raised and defendant shall be assessed costs contained in Claimant's Itemization of Costs attached to the hearing report, excluding the IME expense of Dr. Kuhnlein, which has been addressed under the Iowa Code section 85.39 claim. Therefore the costs to be paid by defendant are the $100.00 filing fee and the $6.48 certified mail expense for service of the original notice and petition.

ORDER

IT IS THEREFORE ORDERED:

Defendant shall pay claimant healing period benefits representing an underpayment of five hundred eighty-nine and 96/100 dollars ($589.96).

Defendant shall pay claimant penalty benefits of six hundred twenty-six and 08/100 dollars ($626.08), which is a penalty benefit of fifty (50) percent for underpayment of healing period and underpayment of permanent partial disability benefits combined.

Claimant shall take no additional permanent partial disability benefits.

Defendant shall reimburse claimant for the lost wages and meal expenses incurred by Mrs. Pesicka in the total amount of one thousand five hundred nineteen and 62/100 dollars ($1,519.62).

Defendant shall reimburse claimant for the examination and report of Dr. Kuhnlein pursuant to Iowa Code section 85.39 in the sum of five thousand three hundred twenty-one and 90/100 dollars ($5,321.90).

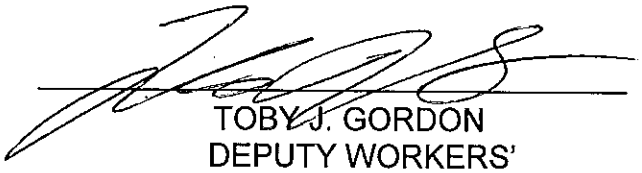
Defendant shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30 and shall be entitled to credit for all weekly benefits paid to date.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30.

Costs as set forth in this decision are taxed to the defendant pursuant to rule 876 IAC 4.33.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 20 day of January, 2017.



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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.