BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANDREW MARNER,	:	
Claimant,	:	File No. 5052510
vs.	:	REVIEW–REOPENING
JOHN DEERE DAVENPORT WORKS,	:	DECISION
Employer,	:	
Self-Insured,	:	Head Notes: 1108.50, 1402.40, 1802
Defendant.	:	1803, 2403, 2907

STATEMENT OF THE CASE

Andrew Marner, claimant, filed a petition against self-insured employer, John Deere Davenport Works (hereinafter "John Deere"), seeking review-reopening. Specifically, claimant seeks to review and reopen an agreement for settlement which was approved by this agency on April 25, 2016.

In the agreement for settlement, the parties set forth numerous stipulations. The parties stipulated that Mr. Marner sustained an injury arising out of and in the course of his employment with John Deere on June 3, 2013. The parties also stipulated the appropriate weekly workers' compensation rate for Mr. Marner is $704.14. This rate is based on an average weekly wage of $1,098.00 for an individual who is married and entitled to two exemptions. The parties stipulated that the June 3, 2013 injury caused temporary disability from June 3, 2013 through July 26, 2015. The parties further stipulated that the work injury caused permanent partial disability for six percent loss of earning capacity pursuant to Iowa Code section 85.341(2)(u). The benefits commenced on July 27, 2015.

Claimant filed a review-reopening petition on March 1, 2018, seeking an increase in his entitlement to permanent disability benefits. This review-reopening proceeding came on for hearing before the undersigned on March 27, 2019 in Davenport, Iowa.

Andrew Marner and Lester Kelty, M.D. both testified live at the time of the review-reopening hearing. The record consists of joint exhibits 1 through 25 and defendants' exhibits A through DD. All exhibits were received into the evidentiary record without objection. Unfortunately, there are numerous duplicate exhibits contained in the record; I will only cite to one of the exhibits.

The parties also submitted a hearing report, which contains stipulations. The parties' stipulations were accepted by the presiding deputy commissioner and are now relied upon in entering this decision. No findings or conclusions will be entered with respect to the parties' stipulations and the parties are bound by those agreements.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant has established a substantial change in condition sufficient to justify a reopening of the April 25, 2016, agreement for settlement.

2. Whether claimant sustained a physical-mental injury as the result of the June 3, 2013 work injury.

3. Whether claimant has demonstrated entitlement to additional healing period benefits from June 21, 2016 through December 12, 2017.

4. If claimant has established a substantial change in condition, the extent of claimant's current industrial disability and resulting entitlement to permanent partial disability benefits, including a claim for permanent total disability under either the traditional industrial disability analysis or under the odd-lot doctrine.

5. Whether penalty benefits are appropriate.

6. Whether costs should be assessed against defendant.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

The parties reached an agreement for settlement (AFS) which was approved by this agency on April 25, 2016. The terms of the AFS stated, in pertinent part, "Claimant's present job is in Department 890, Loader Cab Line, at John Deere Davenport Works. He has no permanent restrictions from the bilateral hernia or the recurrent hernia repair. There is no evidence of a hernia defect." (Joint Exhibit 9, page 62)

In this pending action, claimant alleges that his physical condition has substantially worsened since the 2016 AFS. Mr. Marner contends that he has also sustained a physical-mental injury as the result of the June 3, 2013 work injury. He is seeking additional industrial disability, including a claim for permanent total disability under either the traditional industrial disability analysis or under the odd-lot doctrine. Defendant denies claimant's current alleged condition either arose out of and in the course of employment or is causally related to the bilateral hernia injury of June 3, 2013.

At the time of the review-reopening hearing, Mr. Marner was 55 years old. He graduated from high school in 1982. His work history includes working as a forklift operator, local semi driving, and welding. (JE25, pp. 368-371; testimony)

Mr. Marner began working for John Deere Davenport Works in October of 2010. He worked for approximately eight months as a welder. He later bid into assembly line work. Mr. Marner was working on the assembly line at the time of his June 3, 2013 work-related bilateral inguinal hernia. He underwent bilateral laparoscopic inguinal hernia repair with mesh on July 2, 2013. He had to undergo a second surgery on June 16, 2015. The second surgery was an open left inguinal hernia repair with mesh. Both surgeries were performed by Melinda M. Hass, M.D. Following the second surgery, he was released to return to work effective August 3, 2015, with no restrictions. However, Mr. Marner did not return to work because he opted to have foot surgery to remove a bone spur. (JE25, p. 370; JE3, p. 10; JE7, p. 26; testimony)

Prior to the parties entering into the June 3, 2016 AFS, the case proceeded to an arbitration hearing on March 21, 2016. As of the date of the arbitration hearing, Mr. Marner had not returned to work at John Deere. On May 13, 2016, Mr. Marner was released to return to work from his non-work related foot surgery. Per Dr. Kelty, Mr. Marner was allowed to return to work with no restrictions on May 16, 2016. (JE6, p. 24; testimony)

Mr. Marner returned to work on May 16, 2016. However, while he was out on medical leave, John Deere downsized Mr. Marner's position in the loader line; his position was no longer available. He was moved to the grader or cab line. Mr. Marner spent his first two weeks back to work in training for the new position; this involved a lot of observation while standing and bending. His duties included installing the steering column and other components inside the bottom half of a cab. The job required bending, crouching, and leaning over to reach all of the components in the cab. After approximately three days of training Mr. Marner informed his supervisor that he was having "pinches" and pains from his hernia. He declined the opportunity to see the nurse at the John Deere Clinic. After Mr. Marner's two weeks of training, the plant shut down for one week. Mr. Marner returned to work the following week and by Tuesday he was in pain. He worked again on Wednesday, but took Thursday off hoping the rest would improve his symptoms. However, on Friday, June 17, 2016 Mr. Marner continued to have pain. (Testimony)

In 2016, Dr. Kelty was employed by UnityPoint, and was located at the John Deere plant as their plant medical doctor. Dr. Kelty examined Mr. Marner on June 17, 2016. Mr. Marner reported to the John Deere Clinic with complaints of abdominal pain. He stated that since his last surgery his abdomen was never right. He reported he had not really done anything to re-injure himself, but his job did require him to be in positions that really made him hurt. He also reported "shooting pain like an electrical shock" in his left groin area. Mr. Marner told the clinic he was unable to perform his job because all of the movements and bending were exacerbating his pain in the left lower abdominal and left inguinal area. (JE6, pp. 22-24; testimony)

Also on June 17, 2016, Dr. Kelty conducted a job site visit of the cab line. Another employee, not Mr. Marner, showed Dr. Kelty what had to be done by Mr. Marner in cabs. Dr. Kelty felt Mr. Marner's abdominal pain complaints were not job-related. He recommended Mr. Marner see his primary care physician for any additional treatment. Dr. Kelty stood by this opinion during his testimony at hearing. (JE6, pp. 22-24; testimony)

On June 21, 2016, Mr. Marner went to see Dr. Hass for complaints of left groin pain. He reported that his left groin pain never completely went away, and when he went back to work in May, he really developed left groin pain, especially when he bent over or performed repetitive activities. Dr. Hass released him to return to light-duty work effective June 22, 2016. He was restricted to no lifting over 15 pounds and no repetitive bending for two weeks. John Deere was not able to accommodate these restrictions. Mr. Marner has not worked since June 17, 2016. (JE6, pp. 22-24; testimony)

At the recommendation of Dr. Hass, Mr. Marner saw Kerry Panozzo, M.D. Dr. Panozzo administered a series of left inguinal shots during the summer of 2016. On July 14, 2016, Mr. Marner reported 30-40 percent overall improvement after one ilioinguinal nerve block. After two nerve blocks he reported 40-50 percent improvement. But he also noticed a return of the pain in the left groin after some movement. On August 15, 2016, he reported 70-80 percent overall improvement; this was after three nerve blocks. Again, he noticed some return of the pain in the left groin after some activities. Dr. Panozzo recommended that he return to full duties because he was no longer having 7-8/10 constant pain, rather only one to two days of pain with extreme activity. (JE10) At hearing Mr. Marner testified that these shots were a complete waste of his time. Additionally, Mr. Marner did not agree with Dr. Panozzo's statement that his pain was only a one or a two with extreme activities. (Testimony)

Mr. Marner returned to see Dr. Hass on August 26, 2016. Mr. Marner reported that when he did return to work, he had significant pain. Mr. Marner did not feel he could tolerate any pressure on his groin. He said the pain was better for about a week after the nerve injection, he would feel he could return to work, and then pain would recur. He wanted to get well enough to return to work. Dr. Hass allowed him to return to work on August 29, 2016, lifting no more than 10 pounds and he was to have nothing come in direct contact to his groin. She noted that Mr. Marner continued to have pain consistent with post-op pain related to hernia repair surgery. (JE7, pp. 35-38)

On August 24, 2016, Mr. Marner went to the John Deere Clinic. Dr. Kelty noted Mr. Marner reported that his abdomen was still a problem. Dr. Kelty stated, "he has had nerve blocks and these did not resolve the problem makes it unlikely that it is abnormal nerve growth causing the problem." (JE6, p. 20) Dr. Kelty stood by this opinion at the time of hearing. Dr. Kelty stated he was aware that Mr. Marner had undergone nerve blocks. He testified, "because an injury will cause pain, and that's mediated through nerve fibers, and if we block the nerve fibers, you shouldn't experience the pain." (Tr. p. 130:21-24) Dr. Kelty felt that because Mr. Marner's symptoms fluctuated it was unlikely that his pain was related to a work-related injury. (Tr. p. 131-132)

Mr. Marner saw Dr. Kelty again on August 31, 2016 at the John Deere Clinic. He reported that he had good days and bad days. He was experiencing diarrhea. Today was a bad day and he was just sitting. Mr. Marner stood during the exam because it hurt to sit. Dr. Kelty felt the pain was not related to the hernia and was not work related. (JE6, p. 20) Dr. Kelty stood by this opinion at hearing as well. He noted that diarrhea did not go along with that type of injury. Dr. Kelty testified that he felt Mr. Marner had other health issues that had not been addressed. (Tr. p. 132)

John Deere contends Mr. Marner's present complaints are not related to the stipulated work injury. There are numerous medical opinions in this case.

Dr. Hass is the surgeon who performed both hernia operations. In her June 21, 2016, clinical note she suspected that Mr. Marner's pain was "related to scar tissue, scar in growth into mesh, or nerve entrapment that has developed and worsens when he is more vigorous." (JE7, p. 31) She reiterated her opinion in her deposition:

> Q. Would you agree with me that the most likely sources - - the most likely differential diagnoses for Mr. Marner's left groin pain are the chronic pain in the - - chronic pain in mesh due to compliancy and rigidity or nerve entrapment in the mesh or nerve entrapment in the scar tissue?
>
> Those are - - those three put together comprise a very large probability of what's causing Mr. Marner's groin pain, correct?
>
> A. Correct.
>
> Q. could you put a percentage on that with some degree of comfort?
>
> A. Taking the whole group together encompassing the mesh itself and nerve entrapment in scar tissue, I would say somewhere upwards of 75 percent.

(Dr. Hass depo., pp. 26, lines 7-21; Ex. I, p. 49)

Dr. Hass also testified:

> Q. Would it then be your opinion, to a degree of certainty of more likely than not, that Mr. Marner's groin pain is a sequential condition relating to his prior hernia surgeries?
>
> MR. SAMUELSON: Hold on a second. Just for clarification, you're asking about both surgeries?
>
> MR. SOPER: If she doesn't understand, she can clarify it. I mean, you can read the question back.
>
> MR. SAMUELSON: Do you mind reading the question again?

(Request information read.)

A. I think the answer to that is probably yes, unless it's just related to the mesh itself. Because some people have troubles with mesh. But you could argue that that's related to the surgery, to having it, related to the hernia having occurred. It depends on where you want to stop with etiology.

But if 75 percent of it is the mesh and the nerve entrapment, those are related to the surgery. So I think the answer to that would be yes.

(Dr. Hass depo., pp. 26, ll. 22-25; pg. 27, ll. 1-16; Ex. I, p. 49)

Mr. Marner treated for his pain with Justin G. Wikle, M.D. at the University of Iowa Hospitals and Clinics (UIHC) from October of 2016 through August of 2017. Dr. Wikle noted that Mr. Marner had chronic pain over the incision sites of his hernia operations. In October Dr. Wikle started Mr. Marner on Cymbalta for neuropathic pain as well as depression. Dr. Wikle felt his pain was consistent with neuropathic pain. Dr. Wikle did review the June 2016 CT scan and did not find evidence of a recurrent hernia. In November of 2016 Dr. Wikle noted that Mr. Marner had failed a majority of first and second line treatments. However, he did not feel he was a candidate for interventional therapy. His notes state that he would ask Mr. Marner to see their pain psychologist as well as consider having a discussion with the surgeon regarding possible surgical nerve ablation. In August Dr. Wikle noted that Mr. Marner was reporting more intense pain, left greater than right. (JE11)

Kent C. Choi, M.D., another doctor at the UIHC, saw Mr. Marner in January of 2017. Dr. Choi noted that Mr. Marner had been referred to their pain clinic and had several injections which intermittently controlled his symptoms, but did not last. The doctor stated:

> Overall, I think this patient appears to have significant post-surgical pain in the left groin associated with activity. The pain pattern appeared to be suggestive of possible nerve trapped in the adhesion or with the mesh. This is likely to be the ilioinguinal nerve based on the distribution. I discussed with the patient regarding management options. I do not think removing the mesh at this point is a good option, because it may potentially cause further damage and create new problems.

(JE12, p. 126)

Mr. Marner also treated with Archana G. Wagle, M.D. of QCM Pain Management. His assessment included chronic left lower quadrant abdominal pain with neuropathic pain generators secondary to possible left ilioinguinal neuralgia. (JE13, pp. 132-169)

At the request of John Deere, C.C. Deignan, M.D. examined Mr. Marner in

December of 2017. Dr. Deignan stated, "Based on the timeline of his complaints of pain, it seems most likely that his current pain complaints are related to his bilateral inguinal hernia and the surgical treatment for that injury of June 3, 2013." (JE19, pp. 333-34)

At the request of his own attorney, Mr. Marner underwent an IME with Mark C. Taylor, M.D. on September 12, 2017. Dr. Taylor stated:

> I agree with Dr. Hass' opinion, as well as the specialists at the University of Iowa. They appeared to all be in agreement that his symptoms are consistent with neuropathic pain. His ongoing pain in the inguinal areas, left worse than right, is most likely related to the hernias that he developed (that required surgeries), and with subsequent development of scar tissue versus problems related to the mesh. These can entrap and irritate the nerves in the region and the individual can then develop chronic neuropathic pain. Unfortunately, persistent pain after a hernia surgery is not uncommon. In my opinion, it is unlikely that Mr. Marner's chronic groin pain is the result of some unrelated, and yet undiagnosed, condition. His chronic symptoms more than likely developed as a sequela of his previous hernias that required the previously described surgeries.

(JE17, p. 311)

Dr. Taylor also stated:

> Unless additional information comes to light to suggest an alternative source of pain, it is my opinion that his ongoing complaints are likely related to the hernia and subsequent surgeries with a chronic complication of neuropathic pain. As far as a probability, I would suggest that the probability is greater than 75%.

(JE17, p. 312)

Defendant argues that additional information has come to light. In the months leading up to the March 2019 review-reopening proceeding Mr. Marner saw several medical providers. He has been seen by emergency room doctors, cardiologists, gastroenterologists, and by his general practitioner. When asked about his GI issues, Mr. Marner testified:

> I was having stomach issues where I couldn't eat, and they still don't know why. They took my gallbladder out and I'm still having problems, and a GI – I was scoped, and a colonoscopy, and they said they really can't find anything, so I'm going to have to go to Iowa City to see if it's the hernia doing anything or - - they just don't know, but it's – I don't know. My – I'm having trouble keeping – I just have a nauseous feeling all the time, and I

was taking my pills, and everything was just stopping in my gut, so they don't know what it is.

(Tr. pp. 73, ll. 22 – p. 74, ll. 8)

He has also been treating for his heart, including placement of two heart stents and a defibrillator/pacemaker. Mr. Marner testified about some difficulty he had with a blood thinner medication. He underwent a colonoscopy, which was fine. He also has congestive heart disease and diabetes. Despite all of the medical providers he has seen over the recent months, there has been no new diagnosis. None of these doctors have pinpointed an alternative source of pain with regard to his stomach issues. These doctors do not know if his inability to eat is or is not related to his hernia and subsequent repairs. He has been referred to the University of Iowa Hospitals and Clinics. (Tr. pp. 73-93)

Defendant contends Mr. Marner's recent treatment weakens the opinion of Dr. Taylor and supports the opinion of Dr. Kelty. At the hearing Dr. Kelty testified that he was aware of Mr. Marner's diabetes. He stated that diabetic neuropathy is a condition of the nerves that can cause numbness and tingling and those patients could also report discomfort in the abdominal area and extremities. Dr. Kelty also testified that congestive heart failure could cause fluid buildup and bloating in the abdominal area; this could cause discomfort in the abdominal area. Dr. Kelty opined that Mr. Marner's pain is due to some unknown, undiagnosed condition. (Tr. pp. 121-35)

I do not find the opinions of Dr. Kelty to be persuasive. Although Mr. Marner has undergone recent treatment with numerous specialists, no medical provider has rendered a diagnosis for his symptoms. However, several providers have opined that his ongoing groin/abdominal symptoms are related to the work injury. His treating surgeon, Dr. Hass has stated with at least 75 percent certainty that the most likely sources of Mr. Marner's left groin pain is related to the mesh or nerve entrapment in the scar tissue. (Dr. Hass depo., pp. 26; Ex. I, p. 49) Dr. Hass further opined that his groin pain is a sequential condition related to his hernia surgeries. (Dr. Hass depo., p. 26, ll. 22-25, 27, Ex. I, p. 49) Dr. Wikle felt Mr. Marner's pain over the incision sites was consistent with neuropathic pain. (JE 11) Dr. Choi felt Mr. Marner's pain pattern was suggestive of possible nerve, likely the ilioinguinal nerve, trapped in the adhesion or the mesh. (JE12, p. 126) Dr. Wagle's assessment included chronic left lower quadrant abdominal pain with neuropathic pain generators secondary to possible left ilioinguinal neuralgia. (JE13, pp. 132-169) Dr. Deignan opined it was most likely that Mr. Marner's pain complaints were related to his bilateral inguinal hernia and the surgeries. (JE19, pp. 333-34) Dr. Taylor agreed that Mr. Marner's symptoms were consistent with neuropathic pain and most likely related to the hernias and subsequent surgeries. He felt it was unlikely that his chronic groin pain was the result of some unrelated, and yet undiagnosed, condition. (JE17, p. 311) Based on these opinions, and the record as a whole, I find claimant has shown by a preponderance of the evidence that his left groin/abdominal pain is related to his bilateral inguinal hernia and subsequent surgical treatment for the June 3, 2013 work-related injury.

Mr. Marner has also alleged that his ongoing pain has caused his depression and anxiety. In October of 2016, Dr. Wikle noted that Mr. Marner's pain had greatly affected his ability to go to work and also affected his mood. (JE11, p. 103) In October of 2017, Dr. Wagle referred Mr. Marner to Southpark Psychology for pain management and anxiety. (JE13, p. 147, JE18, p. 317) Mr. Marner began counseling at Southpark that same month. He treated with Alex Hogg, LCSW for concerns related to pain management, anxiety, and depression. Hogg, LCSW diagnosed Mr. Marner with generalized anxiety disorder, with accompanying bouts of depression. Based on the records, it appears the last time Mr. Marner was seen at Southpark was in December of 2017. In June of 2018, Hogg, LCSW issued a letter that stated Mr. Marner's mental symptoms were related to his inability to engage in a normal life and livelihood. He further stated that Mr. Marner's anxiety was caused by the randomness of his physical pain. He did not feel that the anxiety or depression would limit Mr. Marner from working. (JE18, pp. 317-325) However, based on the records from Hogg, LCSW it is difficult to ascertain what information or history the social worker used as the basis for his opinion. For example, in the spring of 2018, Mr. Marner experienced other medical problems, including cardiac problems. His heart problems became so severe that later in 2018, one of the treating cardiologists advised Mr. Marner "to go on full disability due to his significant cardiac condition with the progressive worsening." (JE16, p. 239) It is not known if Hogg, LCSW is aware of this information.

Defendant disputes claimant's contention that his mental symptoms are related to the work injury. Defendant argues that no physician with a medical degree and license has diagnosed Mr. Marner with depression. In August and September of 2017, Dr. Hass noted that he had no mental impairment. (JE7, pp. 46, 48) On December 12, 2017, Dr. Deignan noted Mr. Marner did not have any signs of depression. She ultimately opined that Mr. Marner did not have depression. (Def. Ex. N, p. 106) In September of 2018, Mr. Marner underwent an internal medicine consultative examination with Peter Sorokin, M.D. for the Bureau of Disability Determination Services. Dr. Sorokin performed a mental status examination. He noted Mr. Marner's affect was normal and that there were no signs of depression, agitation, irritability or anxiety. (Def. Ex. U) Based on these opinions and the record as a whole, I find Mr. Marner has failed to carry his burden of proof to demonstrate by a preponderance of the evidence that any mental health symptoms he has are related to the work injury.

We now turn to whether Mr. Marner has sustained a change in condition. In the terms of the AFS, the parties stipulated, "[c]laimant's present job is in Department 890, Loader Cab Line, at John Deere Davenport Works. He has no permanent restrictions from the bilateral hernia or the recurrent hernia repair. There is no evidence of a hernia defect." (JE9, p. 62)

At the time of the AFS, Mr. Marner was still on leave due to his foot surgery. Once Mr. Marner did return to work in June of 2016, he felt pain that felt like he was getting electrocuted. He testified the pain was like nothing he experienced before. Mr. Marner was not returned to the Loader Cab Line in Department 890. Rather, he was assigned to Grader Cab Line as an assembler. This job required Mr. Marner to crouch

and be in awkward positions while installing components. By his third day, Mr. Marner began to feel pinches, tightness in his gut and a shocking feeling. The plant had a one-week shut-down after he had been back to work for two weeks. After the plant shut-down, Mr. Marner worked Monday, Tuesday, and Wednesday. He took Thursday off of work. On Friday, June 17, 2016, he reported that there was something wrong and he felt he could not continue performing that job. (Testimony)

The notes from the John Deere Clinic on June 17, 2016, reflect that Mr. Marner was unable to perform his job because all of the movements were exacerbating his abdominal/left inguinal area. (JE6, p. 22) On June 21, 2016, Mr. Marner brought temporary work restrictions from Dr. Hass consisting of no lifting over 15 pounds and no repetitive bending. The next day, Mr. Marner's supervisor told the John Deere medical department that he was not able to accommodate the restrictions. Mr. Marner was put on Worker's' Indemnity until a determination could be made whether his ongoing symptoms were work related. (JE6, p. 22)

Dr. Kelty's August 31, 2016 clinical note indicates that he feels it is unlikely that Mr. Marner's problems are related to the work injury. (JE6, p. 20) On September 2, 2016, John Deere mailed a letter to Mr. Marner formally denying his workers' compensation claim. (JE24, pp. 363-64) Mr. Marner did receive short-term disability benefits until June of 2017 and then long-term disability benefits which will continue until February of 2022. (JE4, p. 365)

Defendant argues that claimant cannot show he sustained a change of condition because he has not undergone any additional hernia surgeries and has not had any new or recurrent hernias since April 25, 2016. Additionally, defendant argues that Mr. Marner is not taking any medications for his stomach/abdomen or groin. However, these arguments are not persuasive. A review of the evidence demonstrates that Mr. Marner has sustained a change in condition.

Prior to the AFS, Dr. Deignan stated: "The hernia was accepted as compensable. The surgical treatment was successful. Mr. Marner has 0% permanent impairment due to the hernia. Mr. Marner does not require any permanent restrictions for the diagnosis of hernia." (JE9, p. 77) However, after the AFS, Dr. Deignan opined, "According to the 5th Edition of the Guides, Mr. Marner's impairment for hernia is 0%. He does have some continued symptoms which are best described as neuropathic pain. I would place permanent partial impairment at 3% whole body for the neuropathic pain." (JE19, p. 334) I find that this change in the impairment rating due to the development of neuropathic pain, also constitutes a change of condition.

At the time of the AFS, Dr. Deignan, one of the doctors selected by the defendant, stated that Mr. Marner had no permanent restrictions due to his bilateral hernia injury. (JE9, p. 77) However, after the AFS, Dr. Deignan stated, "In my medical opinion, Mr. Marner would best be served by permanent restrictions for no prolonged sitting, must be permitted to alternate position every hour and no forward bending, no crouching, and no heavy lifting over 30 pounds." (JE19, p. 335) Also, after the AFS, Dr.

Hass restricted Mr. Marner to no lifting more than 10 pounds and nothing should come in direct contact with his groin. (JE7, p. 38) There is no indication in the record that this restriction has been lifted. I find that Mr. Marner does have permanent restrictions as set forth by Dr. Hass. Thus, I conclude that he has also demonstrated a change of condition based upon his permanent restrictions.

We now turn to the issue of the extent of permanent disability. Claimant alleges he is permanently and totally disabled, under the traditional analysis or under the odd-lot doctrine, due to the work injury. I find that the evidence does support an award of substantial industrial disability, but not permanent total disability.

Mr. Marner has tried several medications, including Gabapentin and Cymbalta, for his chronic pain. However, he discontinued these due to their side effects. Lexapro did not help his pain levels. (JE13, pp. 129, 170) Mr. Marner has had two rounds of physical therapy, but the therapy was stopped due to pain. (JE12, p. 184) He had four injections which also did not provide any lasting benefit. (JE7, p. 35; JE6, p. 20, JE13, p. 171) Removing the mesh is not a viable option. (JE12, p. 126) He testified that any physical activity triggers severe pain.

Mr. Marner has constant dull pain in his abdomen and groin area. He testified that he is only comfortable driving approximately twenty minutes and would rather be a passenger than the driver so that he may sit back or lean forward. He also experiences pain while walking and must walk slowly. He testified about his pain at hearing:

> Q. No. Today when you haven't been doing anything physical as opposed to if you do something physical.
>
> A. Oh, it's very notable, I mean, as far as - - I haven't worked like I worked when I was at John Deere. The day I took off after those three days, that was unbearable, and now I just kind of go through every day noting and making sure I don't overdo it, because I know what's going to happen. It's going to – it's going to be heck to pay.

(Tr. p. 63, ll. 12-18)

The restrictions assigned by Dr. Hass prevent Mr. Marner from returning to his job at John Deere.

Defendant argues claimant's current income does not provide an incentive to obtain a job. He receives long-term disability payments of $1,550.00 per month. (Testimony; Ex. O, p. 126) He has private disability insurance that pays his monthly mortgage in the amount of approximately $721.00, so long as he is not working. (Testimony; Ex. O, pp. 139-40)

Mr. Marner's actions do not demonstrate an individual who is highly motivated to return to the workforce. Claimant has not conducted any type of job search. Although Mr. Marner does have significant restrictions and experiences pain with activity, no

doctor has opined that he will never work again due to his hernia injury. Although Mr. Marner cannot return to his prior job, no medical provider has opined that he cannot work. Mr. Marner testified that no medical provider has said he could not drive a tractor trailer, a fork truck, or any other vehicle. Mr. Marner has a valid driver's license and a valid CDL. He is not taking any medications that would prevent him from driving a truck or operating a forklift. He did admit that he does not enjoy driving a fork truck because the work was too slow-paced and monotonous. Mr. Marner agreed that there are plenty of fork truck driver jobs at John Deere; however, he has not followed up with John Deere to try and obtain such a job. Mr. Marner admitted that he has not performed any type of job search since the time of the AFS. (Testimony)

I find Mr. Marner's restrictions preclude him from a significant number of jobs. However, I find that the preponderance of the evidence does not show that he is permanently and totally disabled. I further find that he has failed to demonstrate that he is incapable of obtaining employment in any well-known branch of the labor market. I find Mr. Marner has a work history with varied employment and skills that would enable him to pursue alternate employment if he were so motivated. Yet, he has demonstrated no motivation to find alternate work or retraining.

I also find that Mr. Marner has sustained a significant loss of future earning capacity as a result of the work injury. Unfortunately, he has now been out of the labor market for years and he has significant restrictions. He has lost access to a significant portion of his pre-injury employment opportunities. However, he should be able to expand his employment opportunities with a willingness to work and retraining.

Considering Mr. Marner's age, educational background, employment history, ability to retrain, lack of motivation to obtain a job, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 55 percent loss of future earning capacity as a result of his work injury with John Deere Davenport Works.

Mr. Marner is also seeking temporary total disability benefits from June 21, 2016 through December 12, 2017. The parties have stipulated that Mr. Marner reached maximum medical improvement (MMI) as of December 12, 2017 and that he was off of work from June 21, 2016 through December 12, 2017. (Hearing Report) During the period of time that Mr. Marner was off of work he had restrictions. Dr. Hass restricted him to no lifting more than 15 pounds and no repetitive bending for two weeks. John Deere was not able to accommodate those restrictions. (JE6, p. 22) In August of 2016, Dr. Hass changed the restrictions to no lifting more than 10 pounds and nothing could come in direct contact with Mr. Marner's groin. There is no indication that this restriction has been removed by Dr. Hass. (JE7, p. 38)

On August 22, 2017, Dr. Wikle recommended no change in Mr. Marner's work restrictions. (JE11, p. 124) In September of 2017, Dr. Hass indicated she was not able to state when, or if ever, Mr. Marner would be able to return to his regular work or any work. (JE7, p. 48) On December 12, 2017 Dr. Deignan imposed permanent restrictions

of no prolonged sitting, must be permitted to alternate position every hour, no forward bending, no crouching, and no lifting over 30 pounds. (JE19, p. 335) I find that Mr. Marner was not medically capable of returning to substantially similar employment from June 21, 2016 through December 12, 2017.

Claimant contends penalty benefits are appropriate because defendant did not reconsider its initial denial of claimant's claim despite subsequent medical evidence supporting the work-relatedness of the symptoms. On September 2, 2016, John Deere sent a letter to Mr. Marner informing him that they had investigated and evaluated his recent claim and denied his workers' compensation claim. Their denial was based in large part on the opinion of Dr. Kelty. (JE24, pp. 363-364) Claimant argues that despite six subsequent medical doctor opinions confirming claimant's left groin/abdominal pain was due to the bilateral inguinal hernia work injury, defendant did not ask Dr. Kelty to re-evaluate or reconsider his opinion. At hearing, Dr. Kelty testified that he did not contact Dr. Hass for her opinion regarding the cause of Mr. Marner's pain, nor did he review the deposition of Dr. Hass. Dr. Kelty also did not review the IME report of Dr. Taylor, Dr. Choi's January 9, 2017 note, and did not review the IME of Dr. Deignan. At the time of the review-reopening hearing, Dr. Kelty stood by all of his prior opinions. (Testimony)

Defendant denies that penalty benefits are appropriate. Defendant points out that they investigated Mr. Marner's claim and then promptly and contemporaneously mailed him a letter denying his claim and setting forth the basis for the denial. The denial by the defendant was based on the expert medical opinion of Dr. Kelty. I find defendant's argument to be persuasive. At the time of the denial, defendant investigated the claim, relied on Dr. Kelty's opinions, and contemporaneously conveyed the denial and its basis to Mr. Marner. At the hearing, Dr. Kelty stood by his opinions. Dr. Kelty's opinions at the time of the denial and at the time of the hearing provide a reasonable basis for denying the claim. Although there were several doctors who disagreed with the opinion of Dr. Kelty, it was reasonable for the defendant to rely on his opinion. I find Mr. Marner's claim was fairly debatable.

CONCLUSIONS OF LAW AND REASONING

Claimant brings this review-reopening proceeding. A review-reopening proceeding is appropriate whenever there has been a substantial change in condition since a prior arbitration award or settlement. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). Under Iowa Code section 86.14(2), this agency is authorized to reopen a prior award or settlement to inquire about whether the condition of the employee warrants an end to, diminishment of, or increase of compensation. Id.

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 since the time of the initial award or settlement. 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).

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).

Having determined that since the April 25, 2016 AFS, claimant's symptoms have increased, his impairment has increased, and that he now has permanent restrictions which are causally related to claimant's work injury of June 3, 2013, I conclude that Mr. Marner has proven that he sustained a substantial change in his condition that is related to the original injury. Therefore, I conclude that he has established entitlement to reopening, or increase, of his prior industrial disability award. Iowa Code section 86.14(2).

We now turn to the issue of the extent of his entitlement to permanent partial disability benefits. Claimant contends that he is permanently and totally disabled either under the traditional analysis or under the odd-lot doctrine.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

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).

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

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

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

Based on the above findings of fact, I conclude that Mr. Marner has failed to carry his burden of proof to demonstrate that he is permanently and totally disabled. I conclude Mr. Marner's restrictions do preclude him from performing a significant number of jobs. However, the preponderance of the evidence does not show that he is permanently and totally disabled. I further conclude that he has failed to demonstrate that he is incapable of obtaining employment in any well-known branch of the labor market. Mr. Marner has a work history with varied employment and skills that would enable him to pursue alternate employment if he were so motivated. Yet, he has demonstrated no motivation to find alternate work or retraining. I conclude Mr. Marner has demonstrated by a preponderance of the evidence that he has sustained a 55 percent loss of earning capacity. As such, Mr. Marner has demonstrated entitlement to 275 weeks of permanent partial disability benefits.

Claimant is also seeking healing period benefits. 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.

Claimant is seeking penalty benefits from the defendant. In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
>
> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).
>
> (4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Based on the above findings of fact, I conclude defendant had a reasonable basis for the denial of benefits and that the claim was fairly debatable. Therefore, claimant is not entitled to penalty benefits.

Finally, claimant submitted a statement of costs and seeks reimbursement of those costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40.

Claimant prevailed on the majority of the disputed issues in this case. Therefore, exercising the agency's discretion, I conclude that an assessment of costs against the defendant is appropriate.

Claimant is seeking one hundred and no/100 dollars ($100.00) for the filing fee. I conclude that this is an appropriate cost under 876 IAC 4.33(7).

Claimant is also seeking transcription costs in the amount of two hundred sixty and 70/100 dollars ($260.70) for the deposition of Dr. Hass and two hundred twenty-seven and 65/100 dollars ($227.65) for the deposition of Andrew Marner, I find that these are appropriate costs under 876 IAC 4.33(2). Defendant is assessed transcription costs totaling four hundred eighty-eight and 35/100 dollars ($488.35).

Claimant is seeking an assessment for obtaining records from Rock Valley, Michael L. Cullen, M.D. and UnityPoint Heath Quad Cities. I find that these are not allowable costs under 876 IAC 4.33.

Claimant is seeking an assessment in the amount of three thousand four-hundred sixty-five and no/100 ($3,465.00) for the IME of Dr. Taylor. Iowa Code section 85.39 is the sole method for reimbursement of an exam by a physician of the employee's choice. If an injured worker seeks reimbursement for an IME, the provisions established by the legislature, under Iowa Code section 85.39, must be followed. Only the costs associated with preparation of the written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876 IAC 4.33. DART v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015). Dr. Taylor's invoice does not indicate how much of this bill is attributable to the report. Therefore, I find it is not appropriate to assess these costs under 876 IAC 4.33.

Therefore, defendant is assessed costs totaling five hundred eighty-eight and 35/100 dollars ($588.35).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of seven hundred four and 14/100 dollars ($704.14).

Defendant shall pay two hundred seventy-five (275) weeks of permanent partial disability benefits commencing on the stipulated commencement date of December 13, 2017. Defendant shall receive credit for the benefits paid in the Agreement for Settlement. Defendant shall also receive credit under Iowa Code section 85.38(2), as stipulated in the hearing report.

Defendant shall pay healing period benefits from June 21, 2016 through December 12, 2017.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-

year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendant shall reimburse claimant costs as set forth above.

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 9th day of July, 2019.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.