

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KURT KLEMME,

Claimant,

vs.

TEAM ONE LOGISTICS, LLC,

Employer,

and

PROSIGHT SPECIALTY GROUP/
NEW YORK MARINE AND GENERAL
INSURANCE COMPANY,Insurance Carrier,
Defendants.

File No. 1659543.01

ARBITRATION DECISION

Head Note Nos.: 1402.40; 1803.1

STATEMENT OF THE CASE

Claimant Kurtis Klemme filed a petition in arbitration seeking worker's compensation benefits against Team One Logistics, LLC, employer, and Prosight Specialty Group/New York Marine & General Insurance Company, insurer, for an accepted work injury date of January 17, 2019. The case came before the undersigned for an arbitration hearing on January 20, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via Court Call with all parties and the court reporter appearing remotely.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 8, and Defendants' Exhibits A through E.

Claimant testified on his own behalf. Jessica Simmons testified on behalf of the employer. Claimant was given additional time following hearing to submit an additional exhibit. Claimant's exhibit 8 was submitted on February 3, 2021, at which time the evidentiary record was closed. The parties submitted post-hearing briefs on February 26, 2021, and the case was considered fully submitted on that date.

ISSUES

1. The nature and extent of claimant's permanent disability;
2. Payment of certain medical expenses and medical mileage;
3. Payment of claimant's independent medical examination pursuant to Iowa Code section 85.39; and
4. Taxation of costs.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and his demeanor at the time of hearing gave the undersigned no reason to doubt his veracity. Claimant is found credible.

At the time of hearing, claimant was a 58-year old person. (Hearing Transcript, p. 10) He is married with grown children and lives in Davenport, Iowa. (Tr., pp. 9-10) Claimant did not graduate from high school, but did obtain his GED in approximately 1983. (Tr., p. 10)

Much of claimant's work history has been physical in nature. Following high school, claimant worked at Davenport Ice Company as a production warehouse worker, lifting and moving bags and blocks of ice. (Tr., pp. 12-13; Claimant's Exhibit 7, p. 22) He worked there for about six years, and then went to work at Oscar Mayer. (Tr., p. 13; Cl. Ex. 7, p. 22) He started on the production line and was later promoted to crew leader. (Tr., p. 13) The Oscar Mayer job involved processing meat, and he described it as physical in nature. (Tr., pp. 13-14)

In 1991, claimant obtained his commercial drivers' license (CDL). (Tr., p. 10) He then went to work as a truck driver for Thoms Proestler, which is a wholesale food company that delivers to restaurants, nursing homes, schools, and other such businesses. (Tr., p. 14) Claimant's main route took him to the Chicago area. (Tr., p. 15) His job also involved unloading the food deliveries from the truck. (Tr., p. 15)

Claimant worked for Thoms Proestler until 1998, at which time he began a carpenter's apprenticeship. (Tr., pp. 10-11; 15; Cl. Ex. 7, p. 23) Claimant then worked as a carpenter through Carpenters Local #4 until 2009. (Tr. pp. 15-16; Cl. Ex. 7, p. 23) At that time, the economy had taken a downturn and there was a lack of available carpentry work. As a result, claimant went back to trucking, and took a job at Central Refrigeration. (Tr., p. 16) That job involved over-the-road trucking, which took claimant across the country. (Tr., pp. 16-17) After about a year, claimant left that job for a similar over-the-road job with Gordon Trucking for better pay. (Tr., p. 17; Cl. Ex. 7, p. 23)

Claimant worked at Gordon Trucking until 2012, at which time he became self-employed in an attempt to get back to his carpentry work. (Tr., p. 18) However, claimant did not have any insurance or other benefits while self-employed, so in 2013 he started

working for Team One Logistics, defendant employer, again as a truck driver. (Tr., p. 18; Cl. Ex. 7, p. 24)

Claimant's job at Team One consisted of driving a semi-truck and delivering Honda auto parts to Honda dealerships. (Tr., p. 18) The job involves more local driving than claimant's prior trucking jobs. (Tr., p. 19) Claimant testified that the product he delivers is loaded into cages that are about 2 feet by 4 feet and on wheels. The cages are unloaded with a liftgate. (Tr., p. 19) There are also boxes of car parts, including hoods, doors, and roof panels, that are delivered "basically by dragging the boxes." (Tr., p. 19) There are also "superboxes," which weigh over 100 pounds, that they have to deliver at times.

Claimant's shift is from 11:00 p.m. until 10:30 a.m. (Tr., pp. 19-20) On January 17, 2019, claimant was injured while making a delivery at approximately 2:00 a.m. Claimant was with another driver on that particular day, as he was running low on DOT hours due to a snow day he had to make up for earlier in the week. (Tr., p. 20) When claimant and his co-driver, Gene Bass, arrived at their destination in Bloomington, there was freezing drizzle falling, but it did not appear to be freezing on the ground at that point. (Tr., p. 21) Claimant testified that he walked around the back of the trailer to where there is a concrete ramp. When he walked up the ramp to unlock the door, he did not notice any ice. When he turned to come back down the ramp, Mr. Bass had lowered the liftgate, so claimant had to move to a different place on the ramp. When he stepped down, it was icy, and his left foot slid down the ramp and turned sideways. As he reached the bottom of the ramp, his foot hit dry concrete, which stopped his foot and caused it to roll under his body as he fell into the parking lot. (Tr., p. 21)

Mr. Bass saw claimant fall, and was prepared to call an ambulance. (Tr., pp. 21-22) Claimant stopped him and said he wanted to lay there for a moment and see if he would be able to get up on his own. (Tr., p. 22) Claimant said he could not feel his foot at that point as it was numb. Mr. Bass finished the delivery, and by the time he was done he helped claimant up and he was able to get back into the truck. (Tr., p. 22)

Claimant reported his injury right away. With no improvement and worsening symptoms, claimant was sent to Genesis Occupational Health on January 21, 2019, where he initially saw Rick Garrels, M.D. (Joint Exhibit 1, p. 2) X-rays were negative for fractures, so Dr. Garrels diagnosed a sprain. He provided an air brace and recommended physical therapy and work restrictions. (Jt. Ex. 1, p. 3) Claimant testified that the air brace was "flimsy" and did not fit inside his shoe, so "it didn't do any good." (Tr., p. 24)

Claimant returned to Genesis on January 28, 2019, at which time he saw Cheryl Benson, PA-C. (Jt. Ex. 1, p. 6) Claimant testified that PA-C Benson was surprised that claimant had not been provided with a CAM boot at his first visit. (Tr., pp. 24-25) PA-C Benson added orders for a cane and CAM boot, and continued claimant's physical therapy and work restrictions. (Jt. Ex. 1, pp. 7-8) She also noted that claimant should seek earlier follow up if he had any increase in calf pain or swelling. (Jt. Ex. 1, p. 8)

Claimant continued with physical therapy and following up with PA-C Benson. On February 20, 2019, he had an MRI of the left ankle due to ongoing symptoms. (Jt. Ex. 2, p. 25) The MRI showed tears of the anterior and posterior tibiofibular ligaments; longitudinal split tear of the peroneal brevis tendon; mild Achilles tendinosis, and evidence of old plantar fasciitis. (Jt. Ex. 2, p. 25) At his follow-up visit on February 25, 2019, PA-C Benson referred claimant for an orthopedic evaluation. (Jt. Ex. 1, p. 18)

Claimant was seen at Orthopaedic Specialists on March 25, 2019. (Jt. Ex. 4, p. 37) His first visit was with Jason LeGare, ARNP, although his note indicates that Tuvi Mendel, M.D., was present and participated in the examination. (Jt. Ex. 4, p. 38) It was recommended that claimant have surgery to repair the torn tendons.

Claimant had left ankle surgery on April 16, 2019, performed by Dr. Mendel. (Jt. Ex. 5, p. 58) Dr. Mendel's post-operative diagnoses were left ankle anterior talofibular ligament and calcaneofibular ligament disruption with chronic instability; left-sided peroneus brevis tear with peroneal tendon sheath instability; and left-sided disruption of the syndesmosis. (Jt. Ex. 5, p. 58) The procedures performed were left ankle open anterior talofibular ligament and calcaneofibular ligament reconstruction utilizing InternalBrace; Left-sided peroneal brevis repair; left-sided peroneal tendon sheath reconstruction; left-sided open reduction and internal fixation of syndesmosis; and left ankle arthroscopy with aggressive synovectomy and debridement. (Jt. Ex. 5, p. 58)

Following surgery, claimant was non-weight bearing for several weeks. (Jt. Ex. 4, pp. 41-44) He continued with regular follow-up visits. By May 28, 2019, he was fitted for a pneumatic CAM boot and told to begin transitioning to full weight bearing with physical therapy. (Jt. Ex. 4, p. 44) He continued with physical therapy and was eventually transitioned to a lace-up ankle brace. (Jt. Ex. 4, p. 46) On August 6, 2019, claimant reported he was doing well, and felt he was able to do his regular job duties. (Jt. Ex. 4, p. 50) The record of that visit notes that claimant asked to return to work the next day so he could take his DOT physical. He was released to return to regular duty that day. (Jt. Ex. 4, p. 51) Claimant testified that Dr. Mendel told him to continue to wear his lace-up brace for four to six weeks after returning to work. (Tr., p. 36)

After returning to work, claimant had increased swelling and pain. (Tr., p. 31; Jt. Ex. 4, p. 52) Dr. Mendel thought many of his symptoms were "functional and activity related." (Jt. Ex. 4, p. 53) He recommended a compressive stocking to help with the swelling, and prescribed an anti-inflammatory. At his next follow up on October 14, 2019, claimant had not gotten the compressive stocking and continued to have pain and swelling. (Jt. Ex. 4, p. 54) Dr. Mendel determined most of his symptoms were related to the subtalar joint, and provided a subtalar joint injection. (Jt. Ex. 4, p. 55) Claimant was placed at maximum medical improvement (MMI) that day. (Jt. Ex. 4, pp. 55-56) Due to the amount of swelling claimant was experiencing, Dr. Mendel also ordered a venous duplex examination to check for blood clots, which took place on October 23, 2019. (Jt. Ex. 6, p. 61) The report was negative for blood clots.

Dr. Mendel provided a letter dated December 19, 2019, which indicates that both the subtalar joint injection and the venous duplex examination were causally related to

the work injury. (Jt. Ex. 4, p. 57) I find that the venous duplex examination was ordered by Dr. Mendel, the authorized treating physician, in order to check for blood clots due to claimant's work injury. Accordingly, defendants are responsible for payment of charges related to that examination.

Using the AMA Guides to The Evaluation of Permanent Impairment, Fifth Edition, Dr. Mendel provided permanent impairment rating of 2 percent whole person, 5 percent lower extremity, 7 percent foot. (Jt. Ex. 4, p. 57) Defendants paid the 5 percent lower extremity rating, which is equal to 11 weeks of permanent partial disability (PPD) benefits. (Hearing Report, p. 3)

Claimant attended an independent medical evaluation (IME) with Richard Kreiter, M.D., on December 1, 2020. (Cl. Ex. 1) Claimant advised that while he works regularly, he does so with discomfort. (Cl. Ex. 1, p. 3) He also stated that his ankle is very stiff when he first awakens, causing him to limp, but the limp gets somewhat better after "limbering up." His ankle continues to swell on a regular basis, and prolonged walking causes pain. He reported difficulty walking on rough, uneven surfaces, and stated that he uses a cane for walking long distances. (Cl. Ex. 1, p. 3) Dr. Kreiter also notes that claimant reported no prior history of left ankle symptoms, and no significant back, hip, or knee pain. (Cl. Ex. 1, p. 3)

On physical examination, Dr. Kreiter noted that claimant "walks with a limp, especially with the first few steps." (Cl. Ex. 1, p. 3) Dr. Kreiter also found that claimant had difficulty and could not walk heels and toes on the left side. He noted mild swelling of the left ankle compared to the right, and mild decrease in dorsiflexion and plantar flexion on the left. However, he noted "rather significant" decrease in adduction and abduction, and some decrease of talar motion.

Dr. Kreiter's overall impression was "postop ligament reconstruction and syndesmodic repair of the left ankle after significant sprain and ligament injury with progressive ankle joint chondromalacia/early arthritic changes with synovitis and chronic pain." (Cl. Ex. 1, p. 3) Dr. Kreiter opined that claimant's current condition of "progressive left ankle joint deterioration" is consistent with the twisting injury on January 17, 2019 and the surgical outcome. (Cl. Ex. 1, p. 1) With respect to permanent impairment, Dr. Kreiter determined that a rating based on gait derangement would be appropriate, as it "incorporates pain, ability to ambulate and also the ankle changes which are developing." He noted the operative note found articular changes described as "grade 2 articular cartilage medial talus," which was treated by chondroplasty and synovectomy. Additionally, the subtalar joint injection helped, but only for a couple of weeks, which indicates joint involvement. Using page 529, table 17-5 of the AMA Guides, Dr. Kreiter provided a 15 percent whole person impairment rating, due to "gait disturbance, mild severity with antalgic gait, cane used for long walking but not at work or home."

Dr. Kreiter recommended that claimant have work that alternates standing, walking, and sitting as tolerated, and limit climbing. He recommended claimant avoid ladders, crawling, jumping, and rough, uneven ground. With respect to future medical treatment, he suggested conservative treatment with anti-inflammatories and mild

analgesics. He noted that if symptoms increase, an AFO brace or special type of shoe would help decrease motion and stress on the ankle joint. (Cl. Ex. 1, p. 1)

Less than one week later, on December 7, 2020, claimant attended an IME at the request of defendants, with Robert Broghammer, M.D. (Defendants' Exhibit A) Claimant reported his current complaints were constant pain, occasional bruising and swelling, and stiffness with associated balance issues when he first gets up to walk. (Def. Ex. A, p. 10) On physical examination, Dr. Broghammer found range of motion mildly limited on the left compared to right, particularly with inversion and eversion. He noted both plantarflexion and extension were decreased by about 5 degrees. (Def. Ex. A, p. 10) Claimant was able to walk on his heels and toes, by Dr. Broghammer's report, and claimant's gait was observed and "appeared normal and reciprocal in nature with slightly decreased motion of the left ankle noted." (Def. Ex. A, p. 11) There is no mention in Dr. Broghammer's report of any use of a cane.¹

Dr. Broghammer agreed with Dr. Mendel's declaration of MMI and impairment rating, although he suggested the impairment is confined to the foot as opposed to the lower extremity. (Def. Ex. A, p. 11) He further noted that claimant reported no other symptoms or issues other than the ankle. (Def. Ex. A, p. 12) He did not believe claimant required any permanent work restrictions, as he had been working his regular job at full duty since August of 2019.

Dr. Broghammer was later provided with a copy of Dr. Kreiter's IME report, and asked to comment on his 15 percent whole body rating based on gait derangement. (Def. Ex. A, p. 14) In a letter dated December 29, 2020, Dr. Broghammer stated that he did not agree with an impairment based on gait derangement for multiple reasons. First, during his physical examination of claimant "his gait was normal and reciprocal in nature with only mildly decreased range of motion of the left ankle." Second, in order to qualify for a 15 percent rating based on gait derangement, an individual "must require part-time use of a cane or crutch while distance walking." Dr. Broghammer noted that during his examination, claimant did not use any such assistive device, nor was any device utilized ambulating in and out of the clinic. Further, claimant did not report using any assistive device for prolonged walking. Additionally, claimant has returned to his full work duties driving a truck.

Dr. Broghammer also noted that according to section 17.2c of the AMA Guides, on page 529, it indicates that "[e]xcept as otherwise noted, the percentages given in table 17-5 are for full-time gait derangements of persons who are dependent on assistive devices." (Def. Ex. A, p. 15) Given that claimant did not report using an assistive device or have one present during his examination, a rating based on gait derangement was not appropriate. Finally, Dr. Broghammer noted that on section 17.2c also states that "whenever possible, the evaluator should use a more specific method." Dr. Broghammer stated that because range of motion methodology is more specific and

¹ It should be noted that Dr. Broghammer also makes several notations regarding a lack of complaints of back or hip pain throughout his report. This is assumed to be due to claimant's initial petition including his back and hips as injured body parts. At his deposition, taken after the IME, claimant clarified that he is not making such claims. (Def. Ex. E, Deposition Transcript, pp. 32-33)

applicable to claimant's case he opines it is the more appropriate method to use to assign an impairment rating, and there should not be any rating for gait derangement under the AMA Guides' standards. (Def. Ex. A, p. 15)

Dr. Kreiter was given an opportunity to review Dr. Broghammer's reports and address his concerns regarding the impairment rating. In a letter dated February 3, 2021, Dr. Kreiter indicated that he stands by his previous opinions. (Cl. Ex. 8, p. 25) Dr. Kreiter opined that Dr. Broghammer's IME did not give a complete history of the ankle condition, as there is no mention of how far claimant can walk, whether he is able to navigate rough, uneven surfaces, or whether he was asked about use of an assistive device for prolonged walking. With respect to range of motion being the more accurate method to assign impairment, Dr. Kreiter opined that "the moderate decrease in range of motion does not fully describe the ankle joint pathology." (Cl. Ex. 8, p. 25) He further noted that the operative report documented chondromalacia and debridement for grade 2 articular cartilage, medial talus. He noted that the surgery provided some improvement, but the damage to the articular cartilage remained, leading to the present condition. As such, his impairment rating is based on "progressive arthritic change in the ankle which leads to stiffness, gait impairment, and balance problems." He concluded that utilizing gait disturbance addresses the pathology-increasing arthritic changes in the ankle. (Cl. Ex. 8, p. 25)

Claimant testified that he uses a cane on some occasions. For example, he uses a cane when he and his wife visit the cemetery. (Tr., pp. 37-38) Claimant and his wife also attend NASCAR events, and he uses a cane climbing the bleachers. He also bought a mobility scooter and used it to drive from the campground he stayed across to the NASCAR race. (Tr., p. 38) He testified that if he were to walk one mile, he would probably use a cane, but he was unsure if he would be able to walk a mile. (Tr., p. 39) Essentially, he uses a cane if he is walking a long distance or if he is going to be on uneven ground or on a hill. (Tr., p. 40)

When asked why he did not say anything to Dr. Broghammer about using a cane, claimant testified that Dr. Broghammer did not ask. (Tr., p. 57) He further explained that he does not use a cane very often; essentially when he visits the cemetery because of the uneven ground and hill, and when he goes to NASCAR races. He agreed that it is a "rare" occurrence for him to use a cane, and he uses it because his ankle does not feel as stable, especially on uneven ground or going up or down hills, which makes him feel unbalanced. (Tr., p. 59)

Because Dr. Broghammer did not have information regarding claimant's use of a cane, his opinion is based on incomplete facts. Also, claimant testified that he is unable to stand on his heels or toes, and Dr. Broghammer's report is inaccurate in that regard. (Tr., p. 42) Indeed, at his examination with Dr. Kreiter one week earlier, he was unable to walk heels and toes on the left side. (Cl. Ex. 1, p. 3) These inaccuracies and omissions are a detriment to the credibility of his report as compared to Dr. Kreiter's. Additionally, claimant testified that he spent about 15 to 20 minutes with Dr. Broghammer, as opposed to an hour to an hour and a half with Dr. Kreiter. (Tr., pp. 36;

41) Dr. Kreiter appears to have performed a more thorough interview and examination of claimant. As such, I find Dr. Kreiter's report more convincing.

In reviewing the AMA Guides section on gait derangement, section 17.2c on page 529 states, in relevant part:

Gait derangement is present with many different types of lower extremity impairments and is always secondary to another condition. An impairment rating due to a gait derangement should be supported by pathologic findings, such as x-rays. Except as otherwise noted, the percentages given in Table 17-5 are for full time gait derangements of persons who are dependent on **assistive devices**.

Whenever possible, the evaluator should use a more specific method

Section 17.2c does not apply to abnormalities based only on subjective factors, such as pain or sudden giving-way . . .

AMA Guides, p. 529 (underlined emphasis added; other emphasis in original)

Table 17-5 provides whole person impairment ratings for "lower limb impairment due to gait derangement," and categorizes severity as mild, moderate, or severe. Each severity category then provides signs that must be present in order to assign the corresponding rating. All signs under the moderate and severe categories specifically note that they require routine use of some type of assistive device, in addition to other signs. However, under the mild category, the signs do not all include routine use of an assistive device. For mild impairment, the signs listed in Table 17-5 are as follows:

Severity	Individual's Signs	Whole Person Impairment
Mild	a. Antalgic limp with shortened stance phase and documented moderate to advanced arthritic changes of hip, knee, or ankle	7%
	b. Positive Trendelenburg sign and moderate to advanced osteoarthritis of the hip	10%
	c. Same as category a or b above, but individual requires part-time use of cane or crutch for distance walking but not usually at home or in the workplace	15%
	d. Requires routine use of short leg brace (ankle-foot orthosis [AFO])	15%

In reviewing Dr. Kreiter's reports, it is clear he used section c in providing his impairment rating of 15 percent of the whole person. He found that claimant has an antalgic limp (Cl. Ex. 1, p. 3), documented moderate arthritic changes of the ankle (Cl. Ex. 1, pp. 1-3, Cl. Ex. 8, p. 25), and requires part-time use of a cane for distance walking, but not at home or in the workplace. (Cl. Ex. 1, pp. 1, 3) Dr. Kreiter's opinions are supported by the other medical records. Dr. Mendel's operative report notes that claimant had "grade 2 articular cartilage wear of the medial aspect of the talus." (Jt. Ex. 5, p. 59) He then carried out chondroplasty after "aggressive synovectomy and debridement." The records support that claimant has documented moderate arthritic changes of the ankle.

With respect to claimant's gait, Dr. Kreiter noted that claimant walks with a limp, especially the first few steps. (Cl. Ex. 1, p. 3) At his last examination of claimant on October 14, 2019, Dr. Mendel noted that claimant's gait was compensated. (Jt. Ex. 4, p. 54) Claimant testified at his deposition that he walks with a limp, which worsens depending on activity levels. (Def. Ex. E, Dep. Tr., pp. 33-34) He confirmed that testimony at hearing. (Tr., pp. 57-58) Additionally, Jessica Simmons, the operations manager at Team One, testified that claimant has "maybe a little bit" of a limp when he is at work. (Tr., pp. 69-70) Dr. Broghammer opined that claimant's gait appeared "normal and reciprocal in nature." Given the other inconsistencies in his report, however, I do not give his opinion as much weight. The evidence supports that claimant walks with an antalgic limp.

With respect to claimant's use of a cane, he testified that it is occasional to rare. (Tr., pp. 55; 59) However, he also testified that he tends to avoid situations in which he would need to use a cane. For example, he testified that if he is shopping with his wife, he will often sit down to rest or leave because his ankle is bothering him. (Tr., p. 37) If he had to walk a mile, he would probably use a cane, but he did not know if he would be able to walk a mile. (Tr., p. 39) He no longer mows his lawn, and has trouble keeping up with weed-eating. (Tr., p. 44) He no longer uses his snow blower. (Tr., p. 44) He no longer goes on trail hikes with his grandchildren. (Tr., p. 45) He avoids most situations in which he might have trouble walking. However, when he takes trips to the cemetery with his wife, and attends NASCAR races, he uses a cane for both of those activities. (Tr., pp. 37-38; 59) The evidence supports that claimant requires part-time use of a cane for distance walking, but not at home or in the workplace.

I find that claimant has proven that his work injury has resulted in a mild gait derangement to the lower extremity as described by the AMA Guides and Dr. Kreiter's opinion.

CONCLUSIONS OF LAW

The first issue to determine is the nature and extent of claimant's permanent disability. Claimant argues that he is entitled to at least 15 percent of the body as a whole, based on Dr. Kreiter's impairment rating for mild gait derangement. Defendants argue that claimant's permanent disability is limited to Dr. Mendel's rating of 5 percent of the lower extremity.

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

I found Dr. Kreiter's opinions to be more reliable and convincing. Dr. Broghammer did not have complete information regarding claimant's use of a cane, and claimant testified to inaccuracies in his report. Dr. Broghammer's examination took place six days after Dr. Kreiter's examination, but some of the findings on physical examination were quite different. Dr. Kreiter spent a longer period of time personally examining and interviewing claimant. Dr. Kreiter appears to have performed a more thorough interview and examination of claimant. As such, I find Dr. Kreiter's report more convincing.

The other evidence in the record supports Dr. Kreiter's impairment rating based on mild gait derangement. Having determined that claimant proved disability based on gait derangement, I must now determine the nature and extent of his disability. Claimant argues that he is entitled to at least 15 percent of the body as a whole based on Dr. Kreiter's rating. Defendants argue that if disability is found based on gait derangement, the whole-body rating should be converted to a lower extremity rating, as claimant does not have any injury or complaints related to his back or hips, or any part of his body other than his ankle.

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)-(u) or for loss of earning capacity under section 85.34(2)(v). 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).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability.

It is the anatomical situs of the permanent injury or impairment that determines whether the schedules in section 85.34(2)(a) - (u) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Where an injury is limited to a scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

Claimant testified that he is not making any claim with respect to his back or hips. (Tr., pp. 48; Def. Ex. E, Depo Tr., pp. 32-33) His only treatment and only complaints have been related to his ankle. There is no medical evidence that he sustained any permanent injury or impairment to his hips or back. There is no evidence that the anatomical situs of claimant’s permanent injury extends to his body as a whole. Rather, claimant has only proven permanent disability to his lower extremity.

I found that Dr. Kreiter’s 15 percent whole body impairment rating for gait derangement is the correct functional rating that most accurately describes claimant’s condition. A 15 percent whole body rating converts to either a 37 or 38 percent lower extremity rating using Table 17-3 of the AMA Guides, found at page 527. Given the extent of claimant’s injury and ongoing pain complaints, I find he is entitled to 38 percent permanent impairment of the lower extremity, which is equal to 83.6 weeks of permanent partial disability benefits. ($220 \times 38\% = 83.6$) Benefits commence on the stipulated date of October 15, 2019.

Claimant seeks payment of certain medical expenses. (Cl. Ex. 4) The bills from Advanced Radiology and Unity Point Health are related to the venous duplex examination to check for blood clots, which took place on October 23, 2019. The examination was ordered by the authorized treating physician, Dr. Mendel, who opined that it was related to the work injury. As such, defendants are responsible for those expenses, in the amount of \$475.07. (Cl. Ex. 4, p. 10)

Claimant also seeks payment of medical mileage. (Cl. Ex. 6) Defendants have indicated in their brief that they agree claimant is entitled to the mileage expenses. As such, defendants shall pay claimant’s mileage expenses to the extent they have not done so already.

Claimant seeks reimbursement for Dr. Kreiter’s IME bill, pursuant to Iowa Code section 85.39. (Cl. Ex. 5, p. 14) Defendants have not presented any argument to indicate why claimant is not entitled to reimbursement. 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.

Dr. Mendel, an employer-retained physician, provided an evaluation of permanent disability on December 19, 2019. Dr. Kreiter saw claimant for an IME on December 1, 2020. Claimant is entitled to reimbursement for Dr. Kreiter's IME based on Iowa Code section 85.39.

Finally, claimant seeks an assessment of costs. Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

The only remaining cost is the \$103.00 filing fee. (Cl. Ex. 5, p. 13) As claimant was generally successful in his claim, I use my discretion and award claimant the cost of his filing fee.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant eighty-three point six (83.6) weeks of permanent partial disability benefits, commencing October 15, 2019, at the stipulated rate of one thousand one hundred nineteen and 66/100 dollars (\$1,119.66).

Defendants shall be entitled to a credit for all permanent partial disability benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants are responsible for the medical bills as outlined in the decision, found at claimant's exhibit 4, in the amount of four hundred seventy-five and 07/100 dollars (\$475.07).

Defendants shall pay claimant's medical mileage as listed in claimant's exhibit 6, in the amount of three hundred sixty-six and 49/100 dollars (\$366.49).

Defendants shall reimburse claimant for Dr. Kreiter's IME in the amount of one thousand and 00/100 dollars (\$1,000.00), pursuant to Iowa Code section 85.39.

Defendants shall pay claimant's costs in the amount of one hundred three and 00/100 dollars (\$103.00).

Defendants 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 22nd day of November, 2021.



JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

M. Leanne Tyler (via WCES)

Stephanie Techau (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.