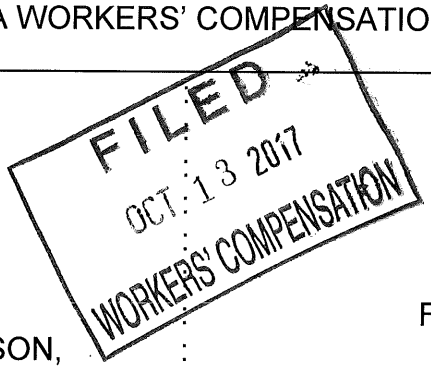
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



MARK NUEHRING, Claimant, vs. BIG BARN HARLEY DAVIDSON, Employer, and WEST BEND MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 5055563 A R B I T R A T I O N D E C I S I O N Head Notes 1108, 1803, 1805.1

STATEMENT OF THE CASE

Mark Nuehring, claimant, filed a petition in arbitration seeking workers' compensation benefits against Big Barn Harley Davidson, employer, and West Bend Mutual Insurance Co., insurer, for an accepted work injury date of May 9, 2015.

This case was heard on August 15, 2017 in Des Moines, Iowa. The case was considered fully submitted on September 5, 2017, upon the simultaneous filing of briefs.

The record consists of Claimant's Exhibits 1, Defendants' Exhibits A-B, JE 1-8, and claimant's testimony.

ISSUES

1. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

2. Whether the alleged injury is a cause of permanent disability and, if so,;

3. Whether the alleged disability is a scheduled member disability or an unscheduled disability;

4. The extent of claimant's scheduled member/industrial disability.

STIPULATIONS

The parties agree claimant sustained a work-related injury on May 9, 2015, which arose out of and in the course of his employment. The parties agree that he endured periods of temporary and permanent disability, although the extent of that disability is disputed.

The commencement date for permanent disability benefits is agreed to be September 8, 2016.

At all times material hereto, claimant was married and entitled to two exemptions. His gross weekly earnings at the time of the injury were $637.00. Based on the foregoing numbers, the parties believe the weekly benefit rate is $425.12.

Prior to the hearing, the claimant was paid 25 weeks of compensation at the rate of $425.12.

FINDINGS OF FACT

Claimant was a 46-year-old male at the time of the hearing. He is married with no dependent children. His educational history includes high school with some community college.

His employment history includes sales and delivery driver. (Exhibit 1, page 4) He does not feel like he could return to any of his prior jobs. His delivery job required a lot of physical work. He believes that his sales positions are outside of his physical capabilities due to the excessive amount of standing and driving.

On or around February 1999, he began working for defendant employer as a motorcycle sales associate. He was performing the same job on the date of his injury. Eighty (80) percent of his job consists of walking and standing. There is little lifting involved. His tasks included moving motorcycles around the sales floor and storage facility, keeping the showroom clean, and customer interaction.

He was paid a commission of the sales. His top earning year was around $48,000.00 per year while his lowest earning year was around $28,000.00 per year.

On May 9, 2015, defendant employer was hosting a tent sales event which required the sales staff to move motorcycles from a storage unit to the sales area. At some point, claimant became crushed between two bikes in an attempt to prevent one from falling. The bike was lifted off of him by co-workers, and claimant was sent to Broadlawns for evaluation and treatment.

After the injury, claimant asked that he not be involved with moving motorcycles. The request was granted. However, claimant felt that his relationship with co-workers and boss deteriorated after the injury. Eventually, because of the pain in his foot, back,

stomach and his anxiety, claimant resigned in 2017. He is currently a "house husband," performing chores around the house. He is not working and has not looked for work.

On July 9, 2013, claimant was seen by his family physician, Kim Countryman, D.O. for weight loss and diarrhea. (Ex. 1:3) His "chief complaint" was "intestinal issues, feels like he is starving." He was taking medications for anxiety. (JE 1:2) A year later, claimant returned to Dr. Countryman for anxiety, cough, diarrhea, fatigue and nausea. (JE 1:4) Dr. Countryman was concerned about claimant's continued weight loss and they discussed the possibility of a colonoscopy. Claimant was instructed to rest. (JE 1:5) He returned to Dr. Countryman on October 24, 2014, for complaints of a continuous cough. (JE1:6) Claimant reported being short of breath while walking or carrying things. (JE 1:6) He was still taking Alprazolam for anxiety. (JE 1:6) He also had continued foot pain, etiology of which was not identified. (JE 1:7)

After the injury and initial evaluation at Broadlawns claimant returned for a follow-up visit with Terrance O. Kurtz, M.D., complaining of pain in the foot on May 18, 2015. (JE 2:12) The record shows that he had seen approximately 30 percent improvement. (JE 2:12)

Claimant went to three physical therapy appointments. The May 18, 2015, visit showed an 80 percent improvement to his foot. (JE 3:15) There was mild bruising in the toe area, but gait and balance was good albeit with some pain. (JE 3:15)

Dr. Kurtz released claimant on June 4, 2015, to regular activity. (JE 2:14) At that time, claimant still had numbness in toes and was taking Paxil and Advil for pain. (JE 2:14)

Claimant began care with Bryan M. Trout, M.D. on July 1, 2015, with complaints about left foot pain, radiating up the through the thigh. (JE 4:16) Dr. Trout recommended continued use of NSAIDs, ice/heat, and elevation. (JE 4:17) Dr. Trout felt claimant could return to work with no restrictions. (JE 4:20) Dr. Trout recommended claimant see a pain management specialist who prescribed 1500 mg muscle relaxers and 350 mg Lyrica a day, as well as pain killers. Claimant felt he was drugged out most of the time.

Dr. Trout followed claimant through 2016 and maintained mostly the same treatment as well as the same work instructions. See e.g. JE 4. In March 2016, claimant exhibited a limp, but his strength was normal in the left ankle as was his range of motion which was recorded as pain free. (JE 4:22)

Claimant returned to Dr. Countryman on February 23, 2016, for treatment of his fractured foot. (JE 1:8) He was still suffering "severe foot pain left foot lateral aspect." (JE 1:8) He had an abnormal gait as well. (JE 1:9)

On September 8, 2016, Dr. Trout recorded claimant's severity level as a 2 out of 10 and that claimant's pain was occasional and improving. (JE 4:24) Claimant's condition was also improved by the use of an ankle brace. (JE 4:24)

> I discussed the patient's current condition with him. Patient is doing much better now with the use of the ankle brace. He is no longer experiencing his ankle and foot giving out while in the ankle brace. I recommended that the patient continue with the use of the ankle brace. I discussed the remaining treatment options that are currently available for the patient. Patient would like to continue with the use of the ankle brace and physical therapy exercises. Follow-up appointment will be 4-6 weeks from today or as needed. If he has any further questions, he will contact the office.

(JE 4:24)

On September 13, 2016, Dr. Trout identified claimant's MMI date as September 18, 2016, and assigned a 14 percent foot impairment or 10 percent lower extremity rating. (JE 4:26)

On October 31, 2016, claimant underwent a medication check up with Dr. Countryman. (JE 1:10) His current medications were:

> Rec: 31Oct2016. List Reconciled and Reviewed.
>
> Escitalopram Oxalate 20 MG Oral Tablet; TAKE ONE TABLET BY MOUTH DAILY; Rx
>
> ClonazePAM 2 MG Oral Tablet; TAKE 1 TABLET BY MOUTH EVERY NIGHT AT BEDTIME; Rx
>
> Nabumetone 750 MG Oral Tablet; TAKE 1 TABLET EVERY 12 HOURS DAILY; Rx
>
> Methocarbamol 500 MG Oral Tablet; TAKE 1 TABLET EVERY 6 HOURS PRN; Rx.

(JE 1:10) He still complained of pain in the left leg and bone pain in the left foot. (JE 1:10)

Claimant saw John W. Rayburn, M.D., for the first time on December 19, 2016, for continued pain. (JE 4:27) The severity level was recorded as a 3. Gait was observed to be smooth and symmetrical. (JE 4:28) Dr. Rayburn did not institute any meaningful changes to claimant's treatment plan other than to recommend increased activity level as tolerated. (JE 4:29)

Claimant returned on January 18, 2017. (JE 4:30) Severity level had increased to a 4. Claimant also reported he was unable to sleep at night due to the pain. (JE 4:30) Dr. Rayburn renewed claimant's prescription for a lidocaine patch and recommended that claimant follow up in 6 months. (JE 4:32)

Claimant felt that the stress was becoming intolerable. He had constant pain while working and testified that he broke a molar in his sleep due to the stress. Since the incident, his teeth chatter all the time. His face twitched during his swearing in and at times during the testimony.

Claimant underwent a psychological evaluation on March 21, 2017, with Arthur H. Konar, Ph.D. (JE 6:44) Dr. Konar noted claimant had a "history of anxiety, depression, and agoraphobia attacks, which have worsened recently. Mark has also suffered from significant weight loss since the accident." (JE 6:44, 45) Dr. Konar may have mistaken, as the unexplained weight loss occurred prior to the accident per Dr. Countryman's records.

Dr. Konar recorded claimant as feeling "good as gold. Eating right. Feeling great" prior to the work injury. (JE 7:58)

Dr. Konar administered the MMPI-2 to claimant. (JE 6:49) Claimant scored high on the malingering test, but, putting all the results together, the test results were deemed "marginally valid." (JE 6:50)

Dr. Konar diagnosed claimant as suffering a major depressive disorder with generalized anxiety. (JE 6:53) Dr. Konar felt that as of March 21, 2017, claimant's depression and anxiety was not stabilized and would benefit from cognitive therapy. (JE 6:53) He also thought it unlikely that claimant would be able to engage in physical labor that he did in the past. (JE 6:53) This may have been in reference to the claimant's self-reference as a "farm boy," as claimant's job as a sales person did not include physical labor as it is commonly defined.

Claimant's position as a motorcycle sales person involved standing, walking, interacting with clients and pushing or riding motorcycles. There was no heavy lifting, pushing, pulling, or carrying as part of his job duties.

Dr. Konar's report does not provide much assistance in determining claimant's physical or mental limitations. Dr. Konar either did not understand the physical nature of claimant's job for the past eight years or did not accurately record it. Dr. Konar's recitation of the past medical history of the claimant was not accurate either. Dr. Konar does not mention claimant's pre-injury rapid and unexplained weight loss. The post-injury records show an increase in weight from July 2015 when he was at 145 pounds and March 10, 2016, when he weighed in at 150 pounds. (JE 4:16)

Dr. Konar goes out of his way to dismiss a portion of the MMPI-2 where claimant scored high on the malingering test. Finally, Dr. Konar's conclusions do not identify

what, if any, work restrictions exist because of claimant's work-related mental injury. Dr. Konar's conclusions are aimed primarily at claimant's physical limitations.

As such, Dr. Konar's opinions are given low weight.

C. Scott Jennisch, M.D., also gave an opinion regarding claimant's mental status. (JE 7) During the examination, Dr. Jennisch recorded several inconsistencies. (JE 7:69)

> Inconsistencies on examination and a tendency to blame things on the May 2015 injury were evident during the course of his evaluation. As stated earlier, Mr. Nuehring reported that his weight loss problems began after the injury when the record clearly documents otherwise. At times, he blamed his weight loss and pronounced gastrointestinal symptoms on his psychiatric conditions and at other times he blamed them on his pain medicine regimen. He also reported that his gastrointestinal symptoms resolved when he discontinued the pain medication two weeks prior to my examination.
>
> At one point, he told me that discontinuing the pain medications two weeks prior to my examination was not a problem because he felt that had resulted in no change in his pain levels. Later in the examination he reported that his pain was substantially less while taking the medications.
>
> The timing of the discontinuation of his pain medications also coincides with his decision to terminate his employment. This is not indicative of termination or the inability to maintain employment for psychiatric reasons. However, on examination he told me that he was unable to work due to his psychiatric condition. When asked to further explain, he told me that he could not work because his teeth were chattering and because of the weight loss. When asked how to explain psychiatric impairment from this he simply told me that he felt that his employer should have followed his work restrictions and he would not be in this situation if they had.
>
> When I asked him to clarify how he could work for two years with his psychiatric condition but could not work now because of it he told me that he thought it was because he stopped drinking. He stated that he felt that his drinking was helping "masked the pain."

(JE 7:69) Dr. Jennisch concluded that claimant may have experienced psychological distress and an exacerbation of his underlying anxiety disorder, but due to the "concerns about reliability and exaggeration associated with the subjective symptom reporting it is not possible to identify the clinical significance of any psychological impact that the work-related physical injury had. It is therefore not possible to associate a

causal relationship between the work-related physical injury and a psychiatric injury." (JE 7:70)

There are two physical IMEs. One was performed by Sunil Bansal, M.D. (JE 5) and the other by John Kuhnlein, M.D. (JE 8)

Dr. Bansal's examination took place on December 2, 2016. (JE 5:34) Dr. Bansal's medical record review begins with the work injury. (JE 5:34-37) Claimant reported pain in his back, hips and both legs. (JE 5:38) Dr. Bansal noted that claimant disagreed with his medical records. (JE 5:38) For instance, claimant was questioned why he was not wearing the boot ordered by his doctor. Claimant maintained that he had never been offered a boot and had never been told his foot was fractured. (JE 5:38) This contradicts his own medical records. Dr. Countryman recorded that claimant presented on November 10, 2015, with "possible broken foot." (JE 1:7) Dr. Countryman was claimant's regular family physician.[1] The records of Dr. Kurtz, on May 18, 2015, note a fracture non-displaced in the left fourth and fifth metatarsals. (JE 2:12) Dr. Trout's diagnosis on July 1, 2015, was a fracture of the left fourth and fifth metatarsal. (JE 4:17) Dr. Bansal did not note these discrepancies.

Claimant also maintained that his employer was in regular violation of work restrictions. However, claimant had no work restrictions after June 4, 2015. Dr. Kurtz released claimant to return to regular activity on that date (JE 2:14) and the podiatrist, Dr. Trout, did not institute work restrictions at any point. (JE 4:23 et seq) Again, Dr. Bansal did not note the inconsistency between claimant's reports and the medical records despite documenting the return to work on page two and three of the IME report. (JE 5:35-36)

On examination, claimant exhibited tenderness to palpation over the fourth and fifth metatarsal, some swelling, and a loss of two-point sensory discrimination, and dysesthesias over the lateral foot. (JE 5:40) He had reduced range of motion of his fourth and fifth toes. (JE 5:40) Dr. Bansal also recorded some tenderness in the lumbar spine as well as guarding. (JE 5:40-41) He diagnosed claimant as suffering from sacroiliitis which he attributed to claimant's work injury. (JE 5:41) Dr. Bansal is the only medical provider to identify and diagnose claimant with a back injury. None of the claimant's previous medical records contain complaints regarding back or hip pain. In the two pain diagram drawings claimant filled out, he marked only the left foot on May 11, 2015 (JE 2:11) and then the left leg on July 1, 2015. (JE 4:19) Dr. Rayburn, a pain management specialist, examined claimant on January 18, 2017, after claimant's appointment with Dr. Bansal. (JE 4:30) His record refers to pain in the foot, smooth gait, and no back pain. (JE 4:30-32)

Nonetheless, Dr. Bansal assigned a 7 percent lower extremity rating for the left foot injury and a 3 percent whole person impairment due to the claimant's sacral injury.

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[1] During the November 10, 2015, visit Dr. Countryman recorded "no lower back pain and no regional soft tissue swelling of both lower extremities." (JE 1:7)

(JE 5:42-43) Dr. Bansal also recommended no frequent bending/twisting and no prolonged standing/walking greater than 60 minutes at a time. (JE 5:43)

I give Dr. Bansal's opinion little weight. He engaged in no real evaluation of the facts presented to him. He ignored or discarded information that was contrary to the conclusions he drew without explanation. The claimant's account of his treatment did not align with the medical records, yet Dr. Bansal gave no consideration to the discrepancies. He diagnosed claimant as suffering from a back injury while no other medical professional, not even claimant's family physician, documented any back pain.

Finally, Dr. Bansal's review of claimant's medical history began solely with the accident and considered nothing previously.

Dr. Kuhnlein's examination took place on May 2, 2017. (JE 8) Claimant reported constant aching pain in his back to his toes as well as down both legs into both feet. (JE 8:77) The pain in his foot was 9/10 at the time of the evaluation. (JE 8:77) Claimant walked "with a left-sided limp that was different in reverse tread and tended to be significantly less. Heel walking was unsteady." (JE 8:79) He exhibited marked grimacing and groaning. (JE 8:79) He professed lumbar flexion-induced leg pain. The examination showed more pain in flexion than extension. (JE 8:80) He had decreased sensation in the sole of his foot and there was some circumferential decrease between the left thigh and the right. (JE 8:80) While he complained of right foot and ankle pain, his examination was unremarkable. (JE 8:80)

Dr. Kuhnlein noted,

> Mr. Nuehring tends to present himself somewhat unusually. He disputed practically every note from Concentra that described symptom improvement and states that he had significant differences of opinion with Dr. Rayburn. However, historically, the left foot pain he experiences is in the area of the healed fractures. Unfortunately, the history he presents of his chronic pain and the physical examination do not match his complaints. Nevertheless, with no other reasonable source for his current chronic left foot pain, this would be attributed to the May 9, 2015, injury, even though there is no well-defined cause of the pain at this time.

(Ex. 8:81)

Dr. Kuhnlein assigned a 10 percent left foot impairment for the metatarsal fractures with an apparent loss of weight transfer. (JE 8:83) For restrictions, Dr. Kuhnlein stated:

> The physical examination, in this case, makes it impossible to assign work restrictions for Mr. Nuehring objectively. From a physical standpoint, there should be no reason for work restrictions for the healed fractures themselves. For the chronic pain, it is reasonable that he should not stand

> or walk for more than 60 minutes without being able to change positions on an as-needed basis. Dr. Bansal's restrictions of no frequent bending or twisting would relate to the lumbar spine, and I'm not able to attribute any spine injury to this case. There may be other issues limiting his ability to work, but I would defer to mental health professions in that regard.

(JE 8:83)

Claimant's inconsistencies to the various experts render his testimony unreliable. For instance, during his visits with Dr. Trout and then again with Dr. Rayburn, claimant's severity level never rose above a 4. Further, when filling out his own pain diagram, claimant marked his left leg and foot, but not his right leg or low back. To both Dr. Kuhnlein and Dr. Bansal, claimant's reports of pain and discomfort were significantly higher. Claimant's account of his psychological state varied a great deal such as identifying a huge weight loss that did not take place post-injury or claiming that various physicians told him that he would never get better. Claimant believed that he had restrictions but the medical records do not reflect that. Claimant felt he was made to work outside of his restrictions and that angered him. "They threw him to the wolves," he said, but there was little evidence in the medical records of this despite claimant maintaining he told every doctor that his workplace (that he described as a family) mistreated him so greatly.

Despite his alleged mental trauma, claimant made no mention of it to Dr. Bansal. He told Dr. Kuhnlein that he had a stress-induced myocardial infarction. There is no evidence of this. He testified at hearing that he broke a molar in his sleep because of stress. There were no dental records bearing this out. Neither of these incidents were reported to Dr. Bansal.

Simply put, claimant was not a reliable or credible witness. As a result, claimant's testimony is given low weight.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to

the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The 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).

While claimant's testimony is given low weight, the contemporaneous treatment records show ongoing pain and discomfort in the left foot. He has developed chronic pain that is genuine enough to warrant the prescription of a lidocaine patch. According to Dr. Rayburn, claimant had decreased sensation in the lateral and distal aspect of the left foot.

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

The evidence does not support a finding that claimant has sustained any permanent injury to his leg. His pain complaints were repeatedly to his left foot and the treatment was for left foot pain, loss of sensation and numbness.

The evidence further does not support a finding that claimant sustained any permanent injury to his back or hips. As stated previously, claimant made no

contemporaneous complaints of back or hip pain. His pain drawings were solely relegated to the foot and leg. He was not treated for any back or hip pain. He showed no impairment of the back or hips on examination except during the visit with Dr. Bansal.

As for the mental injury, claimant did not carry his burden of proof that he sustained a mental injury as a result of the work injury or that, if he did, said mental injury was the cause of any loss of access to the labor market. Therefore, claimant's claim for mental injury is rejected.

Based on the medical records of Dr. Rayburn as well as the opinions of Dr. Trout and Dr. Kuhnlein, it is determined that claimant sustained an injury to his left foot. Because of the loss of sensation and pain, claimant is entitled to a 14 percent left foot impairment or twenty-one (21) weeks of permanent partial disability benefits. Claimant has already been paid 25 weeks of PPD based on a 10 percent impairment rating of the lower left extremity. All appropriate temporary benefits were paid. Therefore, no further benefits are owed.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing.

That each party shall pay their own costs.

Signed and filed this 13th day of October, 2017.

JENNIFER S. GERRISH-LAMPE
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.