

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WAYNE WEST,

Claimant,

vs.

WAL-MART, INC.,

Employer,

and

NEW HAMPSHIRE INSURANCE
COMPANY/AIG,Insurance Carrier,
Defendants.

File No.: 1649874.01

ARBITRATION DECISION

Head Notes: 1800; 1803; 1803.1;
2500

STATEMENT OF THE CASE

The claimant, Wayne West, filed a petition for arbitration seeking workers' compensation benefits from Wal-Mart, Inc. ("Wal-Mart") and New Hampshire Insurance Company/AIG. M. Leanne Tyler appeared on behalf of the claimant. Adam Bates appeared on behalf of the defendants.

The matter came on for hearing on January 13, 2021, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. An order issued on March 13, 2020, and updated June 1, 2020, August 14, 2020, and October 12, 2020, by the Iowa Workers' Compensation Commissioner, In the Matter of Coronavirus/COVID-19 Impact on Hearings (Available online at: <https://www.iowaworkcomp.gov/order-coronavirus-covid-19> (last viewed December 29, 2020)) amended the hearing assignment order in each case before the Commissioner scheduled for an in-person regular proceeding hearing between March 18, 2020, and March 19, 2021. The amendment makes it so that such hearings will be held by Internet-based video, using CourtCall. The parties appeared electronically, and the hearing proceeded without significant difficulties. The matter was fully submitted on February 5, 2021, after briefing by the parties.

The record in this case consists of Joint Exhibits 1-7, Claimant's Exhibits 1-6, and Defendants' Exhibit A. All of the proposed exhibits were received into evidence. Testimony under oath was also taken from the claimant, Wayne West. Janice Doud was appointed the official reporter and custodian of the notes of the proceeding.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.
2. The claimant sustained an injury arising out of and in the course of employment on June 16, 2018.
3. That the alleged injury is a cause of temporary disability during a period of recovery.
4. That the alleged injury is a cause of permanent disability.
5. That the commencement date for permanent partial disability benefits, if any are awarded, is September 21, 2019.
6. That the claimant's gross earnings were four hundred one and 00/100 dollars (\$401.00) per week, and that the claimant was married and entitled to 2 exemptions.
7. That the claimant's weekly rate of compensation is two hundred eighty-one and 06/100 dollars (\$281.06).
8. That the claimant was paid 55 weeks of permanent partial disability compensation at the rate of two hundred eighty-one and 06/100 dollars (\$281.06) per week.
9. That the costs listed in Claimant's Exhibit 9 have been paid.

Any entitlement to temporary disability and/or healing period benefits is no longer in dispute. The defendants waived their affirmative defenses. Any additional credits are no longer in dispute.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. The extent of permanent disability, if any is awarded.
2. Whether the disability is an industrial disability, or whether Iowa Code section 85.34(2)(v) applies.

3. Whether the claimant is entitled to reimbursement for an independent medical examination ("IME") pursuant to Iowa Code section 85.39.
4. Whether the claimant is entitled to reimbursement for certain medical mileage.
5. Whether the claimant is entitled to a reimbursement for certain costs, and if so, the amount.

FINDINGS OF FACT

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

Wayne West, the claimant, was 70 years old at the time of the hearing. (Testimony). He resides in Davenport, Iowa. (Testimony). He has been married for 47 years. (Testimony). His disabled adult son also lives with him and his wife. (Testimony). Mr. West completed education through the eleventh grade. (Testimony). He served in the Army for three months at age 19, but was medically discharged after three months due to a bone growth on his left knee. (Testimony). He eventually earned a GED. (Testimony). Mr. West also completed a computer class in approximately 2009. (Testimony).

He has adult onset diabetes. (Testimony). He also has a history of depression, which resolved by the time the work injury in this case occurred. (Testimony). He has a pacemaker and defibrillator. (Testimony). He also has some history of back pain and bulging discs in his lumbar spine. (Joint Exhibit 4:108-109; Testimony). An L3 to sacrum decompression and fusion was discussed in early June of 2018. (JE 4:110-112).

From 1970 to 1990, Mr. West worked for Freeman-Glickman Furniture. (Testimony; Claimant's Exhibit 6:19). He worked in a furniture warehouse and was the service manager. (Testimony; CE 6:19).

In 1991, Mr. West ran a service station. (Testimony).

From 1991 to 1995, Mr. West worked in shipping and receiving for Wilson Foods. (Testimony; CE 6:18-19). Wilson Foods was a meat products company. (Testimony). He logged product and loaded products. (Testimony; CE 6:18-19). The weight of products was between 50 and 100 pounds. (Testimony).

From 1995 to 2012, Mr. West worked in shipping and receiving at Schebler. (Testimony; CE 6:18). Schebler was a heating and air conditioning company. (Testimony). He unloaded trucks, received items into inventory, and shipped products. (Testimony; CE 6:18). He used a computer to log items received and items shipped. (Testimony). He was laid off when Schebler was sold. (Testimony; CE 6:18).

Mr. West has worked for Wal-Mart for about eight years. (Testimony). At the time of the hearing, he continued to work for Wal-Mart. (Testimony). At Mr. West's deposition, he testified that he earned twelve and 06/100 dollars (\$12.06) per hour. (Defendants' Exhibit A). At the hearing, Mr. West confirmed that he made eleven and 75/100 dollars (\$11.75) per hour. (Testimony). However, he also testified that he made between twelve and 05/100 dollars (\$12.05) and twelve and 15/100 dollars (\$12.15) per hour. (Testimony). He works 32 or more hours per week. (Testimony). He worked 32 or more hours per week prior to the work injury. (Testimony). Prior to his work injury, he performed tasks such as: night maintenance, cleaning restrooms, cleaning floors, and emptying trash. (Testimony). He also pushed carts in from the parking lot. (Testimony). After his injury, he worked as a greeter. (Testimony). He stood for about five to ten minutes every hour, but also sat. (Testimony). At the time of the hearing, he had returned to some maintenance, trash collection, and plastic collection. (Testimony). He also performed COVID testing of Wal-Mart employees, as well. (Testimony). He moved to COVID testing due to a subsequent, unrelated shoulder injury. (Testimony). Mr. West indicated that he planned on continuing to work, and noted that he enjoyed doing so. (Testimony).

Sometime between midnight and 1:00 a.m. on June 16, 2018, Mr. West was moving carts with a cart pusher. (Testimony). He was in the front steering the carts. (Testimony). He tripped on a crack in the sidewalk, and the carts pushed into him, causing him to fall. (Testimony). After he fell, he tried to call the store, but no one answered. (Testimony). He pulled himself up on the cart pusher and drove it into the store. (Testimony). He injured his left hip. (Testimony).

At about 6:00 a.m., on June 16, 2018, Mr. West reported to the emergency room at Genesis. (JE 1:1). He reported pain of 10 out of 10 in his left hip and left lower extremity. (JE 1:1). X-rays of Mr. West's pelvis showed a closed left femur neck fracture. (JE 1:6). Vinay Satti, M.D. indicated that Mr. West required surgery in order to be able to ambulate. (JE 1:10). Post-operative x-rays showed a left hip arthroplasty, and no evidence of hardware complication. (JE 1:12). The left femoral neck also showed a fracture. (JE 1:12). Tobias Mann, M.D. performed a left hip hemiarthroplasty. (JE 1:18-21).

On June 18, 2018, Mr. West was discharged to Manor Care nursing home. (Testimony; JE 2:28). He remained in Manor Care for several weeks. (Testimony; JE 2). While in Manor Care, Mr. West had a course of physical therapy. (JE 2:30-41). Physical therapy consisted of gross motor coordination, gait training, therapeutic exercises, transfers, and static standing balance training. (JE 2:30-41). He also had occupational therapy. (JE 2:42-54). Occupational therapy centered on safety with activities of daily living, and safety. (JE 2:42-54). Mr. West had speech therapy, as well. (JE 2:55-62). By July 6, 2018, Mr. West did not complain of pain. (JE 2:22).

Dr. Mann re-examined Mr. West at ORA Orthopedics on July 2, 2018. (JE 4:113-114). Mr. West told Dr. Mann that he used a cane at times prior to the work injury when

he ambulated long distances. (JE 4:113). Mr. West felt that Manor Care was not working him hard enough to get his strength back. (JE 4:113). Dr. Mann found a healing incision with no sign of infection. (JE 4:113). Dr. Mann ordered x-rays and saw the left hip hemiarthroplasty implant with no evidence of loosening. (JE 4:113). Dr. Mann removed the staples, and told Mr. West to continue therapy. (JE 4:113). Dr. Mann allowed Mr. West to bear weight as tolerated. (JE 4:113).

On July 6, 2018, LeAnne Binion, A.R.N.P., examined Mr. West at Manor Care for his discharge. (JE 3:83-87). Mr. West achieved his goals in physical therapy and occupational therapy. (JE 3:83). He continued to complain of left hip pain of 5 out of 10. (JE 3:83). Hydrocodone relieved his pain. (JE 3:83). Ms. Binion ordered home health physical therapy and occupational therapy, as well as a front wheel walker, upon discharge. (JE 3:87).

Mr. West returned to ORA on July 10, 2018, where Miles Luszczyk, D.O. examined him for his continued back pain. (JE 4:115). Dr. Luszczyk indicated that Mr. West needed to recover from his left hip surgery before the doctor would consider performing additional surgery. (JE 4:115).

On July 13, 2018, Mr. West began home physical therapy. (JE 5:149-158).

Mary Campbell, M.D. examined Mr. West again on July 16, 2018. (JE 3:88-92). Mr. West did home physical therapy, used a walker, and was getting grab bars in the shower at his home. (JE 3:88). He reported sleeping "okay." (JE 3:88). He continued to recover from his fracture and subsequent surgery. (JE 3:88). He used a walker to ambulate. (JE 3:91).

Home therapy began occupational therapy on July 17, 2018. (JE 5:159-167).

Mr. West visited Dr. Mann at ORA Orthopedics on August 3, 2018, for continued postoperative follow-up. (JE 4:117). Mr. West used a walker to ambulate, and displayed an antalgic gait. (JE 4:117). He also started using a cane while in therapy. (JE 4:117). Mr. West told Dr. Mann that he felt that his hip improved on a daily basis. (JE 4:117). Mr. West noted some pain over his left knee, which Dr. Mann diagnosed as osteoarthritis. (JE 4:117). Dr. Mann offered a steroid injection for Mr. West's left knee pain. (JE 4:117). Dr. Mann also ordered physical therapy to begin gait training and strengthening. (JE 4:117). Dr. Mann issued a work return notice indicating that Mr. West could return to sit down work only. (JE 4:118).

Mr. West began physical therapy at Rock Valley in Davenport on August 7, 2018. (JE 6:168-169). Mr. West indicated that his pain was constantly 5 out of 10. (JE 6:168). Mr. West ambulated with a walker, and had an antalgic gait. (JE 6:168). The therapy plan was two appointments per week for six weeks. (JE 6:168).

On August 29, 2018, Dr. Campbell saw Mr. West for an annual wellness visit. (JE 3:93-98). Dr. Campbell noted continued recovery from left hip surgery. (JE 3:93).

Mr. West continued to follow up with orthopedics, who had him working 8 hour days for 4 days per week while seated. (JE 3:93).

On September 11, 2018, Dr. Mann examined Mr. West again. (JE 4:120). Mr. West indicated that the left knee injection helped his left knee pain "a little." (JE 4:120). Any weakness was improving with therapy. (JE 4:120). Mr. West complained that most of his pain was in the knee, rather than the hip. (JE 4:120). He continued to use a walker for longer distance walking, and a cane around his house. (JE 4:120). Dr. Mann recommended continued therapy, including gait training and strengthening. (JE 4:120). Dr. Mann also recommended a referral to a knee surgeon since the injection did not improve Mr. West's symptoms. (JE 4:120). Dr. Mann allowed Mr. West to continue working, but restricted him to only performing sit down work. (JE 4:120-121). Mr. West had another round of therapy at Rock Valley on September 11, 2018. (JE 6:171). Mr. West had increased reliance on a cane with ambulation and increased limping. (JE 6:171).

Mr. West reported to ORA Orthopedics and Suleman Hussain, M.D. on September 26, 2018. (JE 4:122-125). Mr. West indicated that he had continued left knee pain and swelling. (JE 4:122). The record indicated that he complained of pain in his knee only. (JE 4:122). Dr. Hussain found that Mr. West had grade 1-2 primary osteoarthritis of the left knee. (JE 4:124). Dr. Hussain told Mr. West that his left knee pain could be a mix of different problems since his injury. (JE 4:124). Dr. Hussain prescribed physical therapy, and if Mr. West found no improvement, an MRI. (JE 4:125). Dr. Hussain indicated that Mr. West's restrictions should continue, and that Dr. Mann should modify the restrictions, if necessary. (JE 4:126).

On November 1, 2018, Mr. West had another physical therapy visit. (JE 6:172). Forty minutes of physical therapy was performed. (JE 6:172).

Mr. West continued his therapy on November 6, 2018. (JE 6:173). Mr. West reported no pain, but did report weakness. (JE 6:173). Walking for long periods of time was difficult. (JE 6:173). It took him one hour to gather outdoor garbage. (JE 6:173).

On November 7, 2018, Mr. West returned to ORA Orthopedics for a repeat examination by Dr. Hussain. (JE 4:127). Dr. Hussain found minimal crepitation in the left knee. (JE 4:127). Mr. West's left knee was doing well, and Dr. Hussain released him to full duty and maximum medical improvement ("MMI") for the left knee. (JE 4:127). Dr. Hussain deferred to Dr. Mann on restrictions related to the left hip. (JE 4:127-128).

Mr. West followed up with Dr. Mann on November 12, 2018, for his left hip issues. (JE 4:129). Dr. Mann noted that overall Mr. West was doing well. (JE 4:129). Mr. West continued to use a cane due to weakness, and continued physical therapy for strengthening. (JE 4:129). X-rays of the left hip showed a well-aligned hemiarthroplasty with no evidence of loosening. (JE 4:129). Dr. Mann issued new restrictions. (JE

4:129-130). The restrictions were that Mr. West must sit for 10 minutes every hour, must use a cane, and must be allowed to work at a slower pace. (JE 4:129-130).

On January 4, 2019, Mr. West returned to Dr. Mann's office at ORA Orthopedics for a left hip follow-up. (JE 4:131). Overall, Mr. West was doing well. (JE 4:131). Dr. Mann recommended that Mr. West begin work hardening in physical therapy. (JE 4:131). Dr. Mann gave Mr. West a new handicap parking permit, and provided additional work restrictions. (JE 4:131-132). Dr. Mann allowed Mr. West to return to work on January 4, 2019, with no restrictions, but noted that Mr. West should be allowed to work at a slower pace. (JE 4:132).

Mr. West was discharged from therapy to work conditioning on January 24, 2019, after 44 visits between August 7, 2018, and January 24, 2019. (JE 6:174).

In February of 2019, Mr. West had another fall onto his left side due to slipping on ice. (Testimony). After this fall, he testified that he was more careful on ice, and began to use his cane more. (Testimony).

On February 22, 2019, Mr. West had continued therapy. (JE 6:175). He noted falling on ice the prior day on his left side. (JE 6:175). He was sore with an increase in pain overnight. (JE 6:175). As therapy continued, he noted a mild increase in pain. (JE 6:175). The therapist applied ice at the end of the session for pain relief. (JE 6:175).

Mr. West had another therapy appointment on February 28, 2019, where he was progressing towards some goals, but had not met others. (JE 6:176-177).

On March 5, 2019, Dr. Mann examined Mr. West again. (JE 4:133-134). Mr. West reported occasional pain in his groin for the previous two weeks. (JE 4:133). He fell on the ice "a couple of weeks ago." (JE 4:133). Additional hip x-rays were ordered by Dr. Mann. (JE 4:133). Mr. West told Dr. Mann that he felt that he plateaued in therapy. (JE 4:133). Due to recent changes in his job description, Dr. Mann updated his work restrictions. (JE 4:133-134). Dr. Mann indicated that Mr. West was to use his cane as needed, avoid climbing on ladders, and carrying no more than 15 pounds. (JE 4:133-134).

Mr. West was discharged from therapy again on March 7, 2019, due to Mr. West reaching maximum therapeutic benefit and no further care recommended after physician follow-up. (JE 6:178).

Dr. Mann reexamined Mr. West on May 7, 2019, after his left hip hemiarthroplasty. (JE 4:137-139). Mr. West had no pain, but complained of weakness. (JE 4:137). Mr. West indicated that he was not stable without his cane. (JE 4:137). Dr. Mann prescribed therapy for gait training and hip strengthening. (JE 4:137). Dr. Mann also recommended water therapy. (JE 4:137). Mr. West's work restrictions remained the same as those provided on March 5, 2019. (JE 4:137-138).

Mr. West began another round of physical therapy at Genesis on May 14, 2019. (JE 7:179-189). The therapist reviewed Mr. West's history of treatment. (JE 7:179). Mr. West noted that he worked nine hours per day for four days per week at Wal-Mart. (JE 7:179). He worked as a greeter and sat on his walker chair. (JE 7:179). He expressed a desire to "gradually ease back" into his previous position wherein he removed trash, pushed carts, and some light vacuuming. (JE 7:179). Mr. West felt weak in the morning, and was limited in his activities of daily living at home. (JE 7:179). Mr. West could only walk for three minutes. (JE 7:181). He ambulated with a forward flexed antalgic gait and a left compensated, shortened step length on the right. (JE 7:181). The therapist opined that Mr. West presented with symptoms consistent with left hip weakness and decreased range of motion that affected his mobility. (JE 7:182). The therapist noted that a trial of aquatic therapy would be a good option for improving hip mobility. (JE 7:182).

On June 18, 2019, Dr. Mann examined Mr. West for his continued left hip issues. (JE 4:140-142). Mr. West indicated that water therapy helped. (JE 4:140). Dr. Mann recommended that Mr. West continue water therapy, and changed Mr. West's work restrictions. (JE 4:140-142). Dr. Mann recommended that Mr. West continue to use a cane as needed, avoid climbing ladders, and carry no more than 25 pounds. (JE 4:140-141).

Mr. West was discharged from therapy on August 1, 2019. (JE 7:190-191). During his last appointment, he noted that his hip was feeling better over the last few days, but that he continued to experience posterior buttock pain. (JE 7:190). His pain was 2 to 3 out of 10. (JE 7:190). His gait improved, and by the end of this session, he had no buttock pain. (JE 7:191). He continued to note weakness at work, but continued working. (JE 7:191). He also noted that he "[w]ould like to be done with PT at this time." (JE 7:191).

Mr. West returned to Dr. Mann's office on August 19, 2019, with increased pain on the outside of his hip and crepitation in his groin without pain. (JE 4:143). Mr. West had been back to work for six weeks. (JE 4:143). Dr. Mann reviewed x-rays taken during Mr. West's visit. (JE 4:143). The x-rays showed the hip hemiarthroplasty in place with no evidence of loosening and significant "HO." (JE 4:143). Dr. Mann recommended and performed a steroid injection. (JE 4:143). Dr. Mann allowed Mr. West to return to work with no restrictions. (JE 4:143-144).

On August 30, 2019, Mr. West visited Mary Campbell, M.D. for an annual physical examination. (JE 3:99-107). Mr. West told Dr. Campbell that he was doing his usual job, and working 32 hours per week. (JE 3:100). No further mention is made of his hip issues, outside of a brief mention of his surgery. (JE 3:99-107).

Mr. West saw Dr. Mann again on September 20, 2019, as a follow-up for his left hip hemiarthroplasty and left troch bursitis. (JE 4:145-146). He was doing well overall, but told Dr. Mann that his legs felt weak after working. (JE 4:145). Dr. Mann reiterated that Mr. West could return to work with no restrictions. (JE 4:145-146). Dr. Mann noted

that Mr. West continued to have weakness in his leg, but that no further therapy or treatment would improve this. (JE 4:145).

On November 14, 2019, Dr. Mann wrote a letter to Traci Lane of Paradigm addressing whether Mr. West reached MMI, and if he sustained any permanent impairment. (JE 4:147-148). Dr. Mann outlined Mr. West's treatment, and noted that Mr. West still had pain in September of 2019. (JE 4:147). Dr. Mann also opined that Mr. West had heterotopic ossification of the hip. (JE 4:147). Dr. Mann considered Mr. West to have reached MMI on September 20, 2019. (JE 4:147). He noted that it was possible that Mr. West may require more treatment. (JE 4:147). Dr. Mann utilized Table 17.34 of the AMA Guides to Permanent Impairment, Fifth Edition, to assess Mr. West with 40 points based upon his hip replacement. (JE 4:148). Dr. Mann also assessed Mr. West with 8 points based upon a slight limp, and 5 points based upon an occasional use of a cane. (JE 4:148). Dr. Mann also considered that Mr. West used a rail upon climbing stairs, could sit with ease, and could sit in a regular chair. (JE 4:148). Based upon those combined factors, Dr. Mann opined that Mr. West scored between 50 and 84 points. (JE 4:148). According to Dr. Mann's review of Table 17.33, this would be a "fair result for a hip replacement." (JE 4:148). Dr. Mann equated this to a 50 percent lower extremity impairment rating and a 20 percent whole person impairment rating. (JE 4:148).

On November 25, 2020, Richard L. Kreiter, M.D. examined Mr. West. (Claimant's Exhibit 1:1-4). He subsequently issued an IME report. (CE 1:1-4). Dr. Kreiter examined Mr. West for one and a half hours and performed some testing. (Testimony). Dr. Kreiter is a board certified orthopedic surgeon, and a member of the American Academy of Orthopedic Surgeons. (CE 3:7-8). Dr. Kreiter reviewed Mr. West's medical history. (CE 1:2-3). Mr. West continued to walk with an antalgic limp, and used a cane. (CE 1:3). Mr. West had difficulty performing heel or toe walking. (CE 1:3). He also could not attempt a squat without holding onto a counter. (CE 1:3). Internal and external rotation of Mr. West's left hip caused "rather significant pain in the groin and lateral trochanteric and proximal thigh area." (CE 1:3). Dr. Kreiter's impression was that Mr. West had a chronically painful left hemiarthroplasty of the hip for a femoral neck fracture with heterotopic calcification, decreased range of motion with probable synovitis, and possible early degenerative changes in the acetabulum of the left hip joint. (CE 1:4). Dr. Kreiter also noted Mr. West's diabetes, spinal stenosis of the lumbar spine, and coronary artery disease with peripheral vascular disease. (CE 1:4).

Dr. Kreiter opined that Mr. West's fall at Wal-Mart on June 16, 2018, caused his left femoral neck fracture. (CE 1:1). Dr. Kreiter also suspected that Mr. West developed wear in the hip socket with synovitis and inflammation with pain. (CE 1:1). Further, Dr. Kreiter noted that the chronic pain described by Mr. West as instability caused great changes in Mr. West's ability to perform activities of daily living. (CE 1:1). Dr. Kreiter utilized the AMA Guides to Permanent Impairment, 5th Edition, and Table 17-33 to conduct an impairment analysis. (CE 1:1). Mr. West had moderate pain, a moderate limp, use of a cane in his right hand or a walker, difficulty climbing stairs,

difficulty putting shoes and socks on, and required assistive devices. (CE 1:1). Additionally, Mr. West was unable to navigate over rough or uneven ground due to fear of instability and falling. (CE 1:1). Based on Table 17-5 on page 529, Dr. Kreiter indicated that Mr. West had a gait derangement of moderate severity with a chronic limp. (CE 1:1). Dr. Kreiter opined that Mr. West suffered a 75 percent lower extremity impairment rating, which Dr. Kreiter translated to a 30 percent whole person impairment rating. (CE 1:1). Mr. West self-limited himself, and was allowed to have very sedentary activity. (CE 1:1). Dr. Kreiter recommended conservative medical care with mild analgesics and a handicap parking permit. (CE 1:1). Dr. Kreiter concluded that increasing pain and impairment could cause consideration for revision of his left hip to a total hip replacement. (CE 1:1).

He uses a cane when ambulating inside of his house. (Testimony). He also uses a cane when he leaves the house. (Testimony). When he works at Wal-Mart he uses a walker in order to do his job. (Testimony). He experiences instability when walking on uneven ground. (Testimony). He has a fear of falling because of instability. (Testimony). He also can no longer climb a ladder. (Testimony). He has difficulty carrying heavy things due to needing to use his cane and concentrate on his balance. (Testimony).

He is no longer able to mow his lawn or shovel snow. (Testimony). He hired someone to perform these jobs. (Testimony). He can no longer lift anything heavy around the house. (Testimony). He can no longer do maintenance on his house or his vehicle. (Testimony). If he goes grocery shopping, he uses a mobilized cart. (Testimony). He also has assistance in loading his bags. (Testimony). He uses a device to assist him in putting his socks on, and uses a shoehorn to put on his shoes. (Testimony). He does all of these things because his left hip hurts when he bends too much. (Testimony). He also enjoyed bowling, golfing, and camping. (Testimony). He can no longer do these after his injury. (Testimony). He can no longer squat or kneel. (Testimony).

Wal-Mart allows Mr. West to sit down, and only requires him to stand for five to ten minutes at a time. (Testimony). Mr. West expressed a desire to continue working until he is about 80 years old as he enjoys working and interacting with people. (Testimony).

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. 6.904(3).

Permanent Disability

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 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 which determines whether the schedules in Iowa Code 85.34(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).

A hip injury is generally an injury to the body as a whole, and not an injury to the lower extremity. The lower extremity extends to the acetabulum or socket side of the hip joint. For a hip injury to be industrially ratable, disability in the form of actual impairment to the body must be present. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). In this case, Mr. West fractured the neck of his femur, and had a partial hip replacement. A hip replacement takes place on the socket side of the hip joint. Based upon the injuries, the disability is to the lower extremity.

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Iowa Code 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). “Loss of use of a member is equivalent to “loss” of the member. Moses v. National Union Coal Mining Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code 85.34(2)(w), the workers’ compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Consideration is not given to what effect the scheduled loss has on claimant’s earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 399 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

The question of medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. V. Pease, 807 N.W.2d 839, 844-45 (Iowa

2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

In this case, there are two conflicting impairment ratings, one provided by Dr. Mann, the claimant’s treating physician, and one provided by Dr. Kreiter, the claimant’s retained IME physician. Dr. Mann provided a 50 percent impairment rating to Mr. West for his left lower extremity. Dr. Kreiter provided a 75 percent impairment rating to Mr. West for his left lower extremity.

Dr. Mann last examined Mr. West in September of 2019. He also performed surgery on the claimant in June of 2018, and continued to follow and direct Mr. West’s care through September of 2019. Dr. Kreiter performed an IME in November of 2020. He examined the claimant for about one and a half hours. He issued his impairment rating after reviewing Mr. West’s medical records, and examining Mr. West. Both doctors provided ample justification for their impairment ratings based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

In this matter, I find Dr. Mann’s impairment rating to be more persuasive. Dr. Mann performed surgery on Mr. West. He directed Mr. West’s care throughout his healing process, including prescribing several rounds of physical therapy. Dr. Mann continued offering care through September of 2019, when Dr. Mann discharged Mr. West from care. The claimant argues that Dr. Kreiter is more persuasive because of his qualifications. While Dr. Kreiter is highly qualified, I find the opinions of Dr. Mann to be more persuasive. As noted above, Dr. Mann examined Mr. West on a regular basis between his injury and discharge from care.

Therefore, Mr. West is awarded 110 weeks of impairment benefits based upon Dr. Mann’s 50 percent permanent impairment rating to Mr. West’s left lower extremity (50 percent x 220 weeks = 110 weeks).

Medical Mileage

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers’ compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred

for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 1975). Transportation costs includes payment of medical mileage.

The claimant submitted mileage in claimant's exhibit 5:12-15. The claimant alleges that he is owed five hundred twenty-four and 83/100 dollars (\$524.83) for mileage. I utilized Google Maps and input the claimant's address, and the address of each medical provider noted in claimant's exhibit 5:12-15. The claimant's calculation of mileage is correct based upon my review of the records in claimant's exhibit 5:12-15. The only mileage that differs is claimant's calculation of mileage for his IME. I found 12.2 miles roundtrip from the claimant's home to Dr. Kreiter's office. This would be seven and 02/100 dollars (\$7.02). Therefore, the claimant is owed five hundred twenty-three and 34/100 dollars (\$523.34) for unpaid medical mileage.

IME Pursuant to Iowa Code section 85.39

Iowa Code 85.39(2) states:

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Iowa Code 85.39(2).

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

Iowa Code 85.39 was amended in 2017 to include:

An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination

of the reasonableness of a fee for an examination made pursuant to this subsection shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code 85.39(2) (2017).

On November 14, 2019, Dr. Mann provided an impairment rating. The defendants paid for the claimant's medical treatment with Dr. Mann, and the impairment rating was provided to the defendants' insurer in a letter. The claimant subsequently had an IME with Dr. Kreiter. Therefore, it is appropriate for the claimant to be reimbursed for Dr. Kreiter's IME. The reimbursement amount is one thousand and 00/100 dollars (\$1,000.00). While the claimant did not provide an invoice, they provided a copy of the check to Dr. Kreiter. This is sufficient evidence.

Costs

Claimant seeks the award of costs for the filing fee.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

The claimant requests an assessment of one hundred and 00/100 dollars (\$100.00) for the filing fee. Based upon my discretion, I decline to award the claimant one hundred and 00/100 dollars (\$100.00) in costs.

ORDER

THEREFORE, IT IS ORDERED:

The defendants are to pay unto claimant one hundred ten (110) weeks of permanent partial disability benefits at the stipulated rate of two hundred eighty-one and 06/100 dollars (\$281.06) per week from the stipulated commencement date of September 21, 2019.

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

That defendants shall reimburse the claimant five hundred twenty-three and 34/100 dollars (\$523.34) for mileage costs.

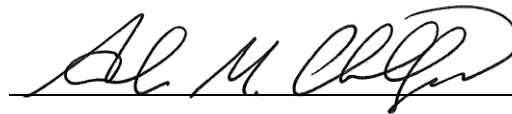
That defendants shall be given credit for 55 weeks of permanent partial disability benefits previously paid, as stipulated.

That the parties shall bear their own costs.

Defendants 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 Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

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

Signed and filed this 20th day of May, 2021.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mary Leanne Tyler (via WCES)

Adam Bates (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.