BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFFREY CARSON, Claimant, vs. SIEMENS, Employer, and TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 1642424.01 and 1653871.01 A P P E A L D E C I S I O N Head Notes: 1402.20; 1402.40; 1803; 1803.1; 1804; 2206; 2501; 2701; 2907; 3202; 4100

Claimant Jeffrey Carson appeals from an arbitration decision filed on August 2, 2021. Defendant Second Injury Fund of Iowa (the Fund) cross-appeals. Defendants Siemens, the employer, and its insurance carrier, Travelers Indemnity Company of Connecticut (Travelers), respond to the appeal. The case was heard on March 4, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 2, 2021.

Prior to the hearing, the parties entered a stipulation, agreeing claimant sustained permanent impairments of 17 percent of the left foot for the ball of the foot, two percent of the right lower extremity, and one percent of the left lower extremity for the heel of the foot. The parties stipulated claimant sustained a first qualifying injury to his right foot on October 1, 2016, with a functional loss of 38 percent of the right lower extremity. The parties stipulated the commencement date for permanent partial disability benefits, if any are awarded, is March 30, 2021, as to the claims against all defendants.

In the arbitration decision, the deputy commissioner found claimant's low back pain is a sequela of the injuries to his left foot, right lower extremity, and left lower extremity. The deputy commissioner found claimant's back pain is not a new injury and

found claimant failed to prove he suffered a permanent aggravation of his low back pain. The deputy commissioner found claimant is not permanently and totally disabled. The deputy commissioner found claimant sustained 20 percent impairment of the body as a whole and awarded him 100 weeks of permanent partial disability benefits from Siemens and Travelers, commencing on March 30, 2021. The deputy commissioner found claimant sustained 60 percent industrial loss as to the Fund and awarded claimant 184.3 weeks of permanent partial disability benefits from the Fund, after a credit of 115.7 weeks, commencing on March 30, 2021. The deputy commissioner found claimant is not entitled to additional chiropractic care and denied claimant's request for alternate care.

On appeal, claimant asserts the deputy commissioner erred in finding claimant did not sustain permanent impairment of his low back caused by the work injuries. The Fund asserts the deputy commissioner applied the wrong legal standard in finding claimant sustained a sequela injury to his low back, but then found he did not sustain a new injury causing a permanent impairment to his low back, arguing the proper analysis is whether the accepted injuries to his left foot, right lower extremity, and left lower extremity caused a permanent, material aggravation or permanently lit up claimant's preexisting back condition. The Fund asserts the deputy commissioner erred in awarding claimant benefits from the Fund. Claimant did not challenge the denial of his request for alternate care on appeal. Siemens and Travelers assert the arbitration decision should be affirmed in its entirety.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration filed on August 2, 2021, is affirmed in part, it is modified in part, and it is reversed in part.

I affirm the deputy commissioner's finding that claimant's low back pain is a sequela of his left foot, right lower extremity, and left lower extremity injuries. The deputy commissioner then examined whether claimant's back pain is a material aggravation or a new injury, finding the back pain is not a new injury, and finding claimant failed to establish he sustained a permanent impairment. I reverse the deputy commissioner's finding and conclusion that claimant did not sustain permanent impairment of his low back caused by the work injuries with the following analysis:

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held an injury occurs "in the course of employment" when:

> . . .it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

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 v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). 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).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

The parties stipulated the 2017 and 2018 work injuries caused permanent impairments to claimant's left foot, right lower extremity, and left lower extremity. The parties dispute whether the work injuries aggravated, accelerated, worsened, or lighted up claimant's preexisting low back condition.

The statute and case law do not require a finding claimant sustained a new injury to establish he sustained a permanent impairment of his low back caused by the work injuries. The law is clear, if a claimant's preexisting condition or disability is "aggravated, accelerated, worsened, or 'lighted up' by an injury arising out of and in the course of employment resulting in disability," then claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). I find claimant's sequela low back pain has caused a permanent impairment.

Two physicians have provided causation opinions regarding claimant's low back pain, John Kuhnlein, D.O., an occupational medicine physician who performed an independent medical examination for claimant, and later a records review for the Fund, and Trevor Schmitz, M.D., an orthopedic surgeon who performed a virtual independent medical examination for Siemens and Travelers. Derek King, D.C., treating chiropractor, also provided a causation opinion. Dr. Schmitz opined claimant did not sustain permanent impairment caused by the 2017 work injury. Drs. Kuhnlein and King opined claimant did sustain permanent impairment of his low back caused by the work injuries.

Dr. Schmitz opined the 2017 work injury "in no way caused a temporary material aggravation of [claimant's] prior low back and/or joint conditions," alleging claimant had a longstanding history of low back pain treatment and an altered gait causing pain before the work injury. (Ex. C, p. 4) Dr. Schmitz found there was no traumatic episode causing a new injury to claimant's low back and that claimant had no permanency to his back or joints. (Ex. C, pp. 4-5) The deputy commissioner did not find Dr. Schmitz's opinion persuasive due to the lack of a physical examination. I agree with this assessment based on the lack of a physical exam.

Dr. King has treated claimant since 2014. Following claimant's 2017 and 2018 work injuries, Siemens and Travelers authorized chiropractic treatment for claimant's hip and low back pain with Dr. King, which was ordered by several authorized treating providers. Dr. King continued to treat claimant at the time of the hearing. In October 2020, Dr. King signed a statement agreeing the care he provided to claimant before the December 27, 2017, work injury was intermittent, and claimant reported receiving significant relief from the treatment. (Ex. 8, p. 1) Dr. King stated that over the eight months before he issued his statement claimant's low back and sacroiliac condition had become more severe, and Dr. King opined, "the longer a person goes with an altered gait, the more impact it has on the other parts of the person's body. In [claimant's] case, I believe he is now left with a chronic/permanent condition in his low back and SI joint." (Ex. 8, pp. 1-2)

While noting Dr. King "arguably is in the best position to opine" as to claimant's status, the deputy commissioner discounted Dr. King's report, finding his records were largely the same from visit to visit and finding claimant's "longstanding relationship [with Dr. King] also calls into question Dr. King's objectivity and opinions." (Arb. Dec. p. 44) Based on my de novo review I disagree with the deputy commissioner's finding and conclusion. The record does not contain evidence showing Dr. King's opinions are biased or flawed. Claimant's medical records and Dr. Kuhnlein's opinion are consistent with Dr. King's conclusions.

Claimant attended one appointment with Dr. King in 2014, seven appointments in 2015, three appointments in 2016, and one appointment in 2017, for pelvic pain, low back pain, thigh muscle pain, and sacroiliac pain, before the December 27, 2017, work injury. (Ex. D) In November 2016, claimant underwent an amputation of half of his right foot. Claimant attended an appointment with Dr. King on December 22, 2016, complaining of a gait disturbance causing sacroiliac pain following the amputation. (Ex. D, pp. 3-4) Claimant's next visit with Dr. King was eight months later, on August 2, 2017, when he complained of sacroiliac pain "for the last week or so" that had been getting worse. (Ex. D, p. 1-2) Dr. King's treatment records do not support claimant received longstanding and continuous treatment for low back pain and sacroiliac pain before the work injuries. The records show after March 12, 2018, claimant experienced ongoing pain that waxed and waned with improved orthotics but continued during the more than 40 appointments claimant attended with Dr. King to treat his low back and sacroiliac joint pain, consistent with Dr. Kuhnlein's findings. (JE 4; Exs. 3, p. 4; 14, p. 1)

Claimant's authorized treating providers, chosen by Siemens and Travelers, documented claimant was experiencing increased hip and back pain when wearing a cam boot and orthotics and recommended additional chiropractic treatment. In May 2019, Michelle Gerdes-Boelens, DPM, noted claimant had increased bilateral hip pain after transferring from a cam boot to an orthotic, and recommended chiropractic care for claimant's pain. (JE 1, pp. 219-221) In November 2019, James Milani, D.O., an occupational medicine physician, first examined and treated claimant for left hip pain and agreed "using the muscle differently around the hip due to walking differently will cause tightness and 'imbalance.' This needs to be recognized and dealt with such as stretching and as much correction as possible for the gait disturbance," and Dr. Milani recommended new orthotics and "chiropractic treatment for the left hip due to muscle tightness." (JE 1, pp. 231-233) Duane Hanzel, DPM, also recommended chiropractic care for claimant's gait issues on May 12, 2020, May 26, 2020, June 16, 2020, June 23, 2020, June 30, 2020, and August 4, 2020. (JE 3, pp. 30-87) Dr. Hanzel signed a statement on July 14, 2020, stating the off-load orthotic wedge he prescribed for claimant to keep pressure off the ball of his left foot resulted in a significant limb length discrepancy, and shifted claimant's gait affecting the sacroiliac joint, "which has resulted in significant pain and discomfort for [claimant] in his low back," opining within a reasonable degree of medical certainty that claimant's "low back pain is directly related to the off loading and limb length changes." (Ex. 7, p. 1)

Following his November 12, 2019, examination, Dr. Kuhnlein noted if the history claimant presented is accurate, claimant developed significant gait alterations following his work injuries, which produced low back pain, which Dr. Kuhnlein found was a sequela to the work-related left foot injury and subsequent right foot work-related injury because of the gait changes. (Ex. 3, p. 10) Dr. Kuhnlein issued a provisional permanent impairment rating of three percent for the back pain caused by the work injuries. (Ex. 3, p. 11) The day before claimant attended his appointment with Dr. Kuhnlein, claimant attended an appointment with Dr. Milani, who ordered additional orthotics and chiropractic treatment for claimant's pain complaints. (JE 1, pp. 232-233)

After claimant received additional treatment, the Fund sent Dr. Kuhnlein additional records, including Dr. King's records before and after the work injuries. (Ex. 14) Dr. Kuhnlein opined the records showed claimant had intermittent issues with low back and sacroiliac joint pain extending to 2014, but before the December 2017 injury, there was no evidence of continuous care for low back pain. (Ex. 14, p. 1) Dr. Kuhnlein noted after the work injuries, claimant consistently related his back or sacroiliac joint problems to wearing the cam boot or orthotics, and while claimant's chiropractic notes indicated an improvement in his pain, he was wearing more appropriate orthotic insoles by that time. (Ex. 14, p. 2) The later chiropractic notes included more frequent visits than before the injury, which represented a difference in the treatment pattern for claimant's back pain in comparison to the pattern before his work injuries, suggesting permanence. (Ex. 14, p. 2) Dr. Kuhnlein opined the cam boot claimant wore following the amputation of the middle and medial cuneiform bones in his right foot aggravated his back pain, leading to chiropractic care ordered by treating providers, including Dr. Milani. Dr. Kuhnlein opined that while claimant's back pain improved with more appropriate orthotic inserts, claimant still had problems despite using the appropriate inserts, and more likely than not his back pain was related to changes in his left foot. (Ex. 14, p. 2) Dr. Kuhnlein opined his causation opinion has not changed over time and that claimant's low back condition is permanent. (Ex. 14, p. 2)

I find Dr. Kuhnlein's opinion to be the most persuasive, as supported by the treatment records, by Dr. King's opinion and by claimant's testimony at hearing. No physician, other than Dr. Schmitz, has opined claimant's low back pain was not aggravated, worsened, or lit up by the work injuries. For the reasons set forth above, including the lack of a physical exam, I do not find Dr. Schmitz's opinion persuasive. I find claimant has established his sequela low back pain is a permanent impairment. Therefore, it is necessary to consider the nature and extent of claimant's disability.

I affirm the deputy commissioner's finding claimant is not permanently and totally disabled, I modify the deputy commissioner's award of 100 weeks of permanent partial disability benefits from Siemens and Travelers, and I reverse the award of 184.3 weeks of benefits from the Fund, with the following analysis:

Iowa Code section 85.34(2) governs compensation for permanent partial disabilities. The law distinguishes between scheduled and unscheduled disabilities. The commissioner evaluates disability using two methods, functional and industrial. Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

The commissioner applies the functional method to enumerated body parts in the statute. Iowa Code § 85.34(2)(a)-(u); Westling v. Hormel Foods Corp., 810 N.W.2d 247, 252 (Iowa 2012). Each of these subsections provides a maximum number of weeks of compensation for the complete loss of a scheduled member or body part. The commissioner uses the industrial method for "all cases of permanent partial disability other than those" set forth in Iowa Code section 85.34(a) through (u). Iowa Code § 85.34(2)(v). All other cases are classified as "unscheduled injuries." Westling, 910 N.W.2d at 252-253. Compensation for unscheduled injuries is determined by examining the reduction of earning capacity. Id. at 253. The back is not listed as a scheduled member in Iowa Code section 85.34(2)(a) through (u), therefore, industrial analysis is applied in this case.

When evaluating loss of earning capacity, the commissioner evaluates several factors, including the claimant's functional disability, age, education, qualifications, experience, and ability to engage in similar employment. Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-138 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability begins at the termination of the healing period. Iowa Code § 85.34(2). Compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(v). When considering the extent of disability, the commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016). The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 370 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)).

Claimant alleges he is permanently and totally disabled. Defendants reject claimant's assertion. In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability but is so injured that the claimant is "unable

to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

"Total disability does not mean a state of absolute helplessness." Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633.

The parties stipulated claimant sustained 17 percent permanent impairment of his left foot for the ball of the foot, two percent permanent impairment of the right lower extremity, and one percent permanent impairment to the left lower extremity for the heel of the foot. As discussed above, I found Dr. Kuhnlein's causation opinion to be the most convincing. Dr. Kuhnlein opined claimant sustained three percent permanent impairment to his low back as a result of the work injuries.

Levi Nathan Gause, M.D., the treating orthopedic surgeon ordered a functional capacity evaluation (FCE) to determine claimant's restrictions. The first FCE found claimant could engage in heavy work. (Ex. F) A second FCE found claimant was capable of lower medium work. (Ex. 2) Dr. Gause adopted the restrictions in the second FCE as claimant's permanent restrictions. (Ex. 5, p. 3) According to the second FCE claimant is able to lift 25 pounds waist to floor occasionally and 35 pounds rarely, 15 pound waist to crown occasionally and 25 pounds rarely, front carry 25 pounds occasionally and 35 pounds rarely. (Ex. 2, p. 4) The physical therapist also noted limitations with elevated work, forward bent standing, sitting, standing, walking, kneeling, reaching, and using stairs, and found claimant is unable to crouch. (Ex. 2, pp. 6-7) Dr. King recommended restrictions of being able to sit and stand intermittently to help reduce the issues from claimant's altered gate. (Ex. 8, p. 2) I adopt the restrictions from the second FCE, along with Dr. King's restriction of sitting and standing intermittently as claimant's permanent restrictions.

Claimant resides in Macomb, Illinois. At the time of hearing claimant was 47. Claimant is a high school graduate. He has a lengthy work history as a stocker, food distributor, picker, material handler, and machine/press operator. He briefly worked as a working supervisor. Most of claimant's work experience is with heavy work as a machine operator. Claimant has not worked since the second injury on July 11, 2018. After his work injuries, claimant successfully applied for Social Security Disability Insurance (SSDI) benefits based on the injuries that are the subject of this case and he was receiving SSDI benefits at the time of the hearing. Claimant had not looked for work at the time of the hearing. I find claimant is not motivated to work. Given his current restrictions, claimant cannot return to work as a machinist. However, no vocational evidence was presented at hearing regarding claimant's functional limitations and residual capacities related to work or of the labor market near claimant's home. I

find claimant has not established he is permanently and totally disabled under the statute or under the odd-lot doctrine. Considering all the factors of industrial disability, I find claimant has sustained 75 percent industrial disability, entitling him to receive 375 weeks of permanent partial disability benefits from Siemens and Travelers at the stipulated weekly rate of $761.93, commencing on the stipulated commencement date of March 30, 2021.

To recover industrial disability benefits from the Fund, a claimant must establish: (1) the claimant sustained a first qualifying loss to a hand, arm, foot, leg, or eye; (2) a second qualifying loss to another hand, arm, foot, leg, or eye; and (3) the claimant has sustained a permanent disability resulting from the first and second qualifying losses exceeding the compensable value of the "previously lost member." Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 398-99 (Iowa 2010). Claimant has not established a second qualifying loss given he sustained an industrial disability as a result of the 2017 and 2018 work injuries. Therefore, claimant shall take nothing from the Fund.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 2, 2021, is affirmed in part, it is modified in part, and it is reversed in part with the above-stated additional analysis.

For File No. 1642424.01 – Injury Date of 12/27/17:

Claimant shall take nothing further, pursuant to the stipulation of the parties.

For File No. 1653871.01 – Injury Date of 07/11/18:

Defendants Siemens and Travelers shall pay claimant 375 weeks of permanent partial disability benefits, at the stipulated weekly rate of seven hundred sixty-one and 93/100 dollars ($761.93) per week, commencing on March 30, 2021.

Defendants Siemens and Travelers shall receive credit for all benefits previously paid, as stipulated.

Defendants Siemens and Travelers shall pay accrued weekly benefits in a lump sum together with interest 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, as required by Iowa Code section 85.30.

Claimant shall take nothing from Defendant Second Injury Fund of Iowa.

Claimant's petition for alternate medical care is denied.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Pursuant to rule 876 IAC 4.33, claimant and defendants Siemens and Travelers shall split the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants Siemens and Travelers shall file subsequent reports of injury as required by this agency.

Signed and filed on this 31st day of January, 2022.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Nicholas Pothitakis (via WCES)

James Bryan (via WCES)

Amanda Rutherford (via WCES)