BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT R. TYSOR, Claimant, vs. HULL TRAILERS, INC., Employer, and TRAVELERS INDEMNITY COMPANY OF CT., Insurance Carrier, Defendants.	File No. 5053761 ARBITRATION DECISION Head Note Nos.: 1108.20; 1402.40; 1703; 1803.1; 2204; 3002

FILED
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WORKERS' COMPENSATION

STATEMENT OF THE CASE

Claimant Robert Tysor ("Tysor") filed a petition in arbitration on December 11, 2015, alleging he sustained an injury to his right leg and posttraumatic stress disorder, while working for the defendant, Hull Trailers, Inc. ("Hull Trailers"), on July 15, 2013. Hull Trailers and the defendant, Travelers Indemnity Company of Connecticut ("Travelers") filed an answer on January 5, 2016.

An arbitration hearing was held on November 2, 2016, at the Pottawattamie County Courthouse in Council Bluffs. Attorney Jacob Peters represented Tysor. Tysor appeared and testified. Attorney Patrick Waldron represented Hull Trailers and Travelers. Exhibits 1 through 15 and A through I were admitted into the record. The record was left open through December 16, 2016, for the receipt of post-hearing briefs. At that time the record was closed.

Before the hearing the parties prepared a hearing report listing the stipulations and issues to be decided. Hull Trailers and Travelers withdrew all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.

2. Tysor sustained an injury on July 15, 2013, which arose out of and in the course of his employment with Hull Trailers.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. Temporary benefits are no longer in dispute.

5. The alleged injury is a cause of permanent disability.

6. The commencement date for permanent partial disability benefits, if any are awarded, is September 15, 2014.

7. Medical benefits are no longer in dispute.

8. Prior to the hearing Tysor was paid 110 weeks of permanent partial disability benefits at the rate of $400.44 per week.

9. Costs have been paid.

ISSUES

1. What is the nature of Tysor's disability?

2. What is the extent of Tysor's disability?

3. What is Tysor's weekly benefit rate?

4. Are Hull Trailers and Travelers entitled to a credit for overpayment of benefits as set forth in Exhibit E?

5. Should costs be assessed against either party?

FINDINGS OF FACT

Tysor lives in Westboro, Missouri with his wife, Loretta Tysor, and two stepdaughters. (Transcript, pages 9-11; Exhibit H, p. 87) At the time of the hearing Tysor was 47. (Tr., p. 10; Ex. A-1, p. 1) Tysor married his current wife on October 5, 2013, after his July 2013 work injury. (Tr., p. 10; Ex. H, p. 87)

Tysor was incarcerated from 1987 through March 2010. (Tr. p. 11) Tysor testified he was convicted of "[b]urglary. I had pot, pot charge when I was young. I had an escape, have a weapon, gun case, and as a whole habitual offender." (Tr., p. 56) Tysor became addicted to heroin in prison. (Tr., p. 45; Ex. H, p. 96)

Tysor dropped out of school in the ninth grade, but obtained a GED in prison. (Tr., pp. 11, 54; Ex. H, p. 89) Tysor is an avid reader and has read thousands of books. (Tr., p. 57; Ex. H, pp. 89-90) Tysor is bilingual and speaks fluent Spanish and English. (Tr., p. 57; Ex. H, p. 90) While he was in prison, Tysor tutored inmates in English and Spanish on adult basic education. (Tr., pp. 57-58; Ex. H, p. 90)

Tysor has always been good at fixing things and has "always tinkered." (Ex. H, pp. 90-91) While he was in prison Tysor repaired weight equipment and radios. (Ex. H, pp. 90-91)

After Tysor was released from prison Kawasaki hired Tysor to work on an assembly line building flywheels. (Tr., p. 12; Ex. H, p. 92) Tysor reported the work was heavy, "[y]ou had to carry from machine to machine, about 10 machines, 25-pound weight that they - - that turns into a flywheel. And so for eight hours pull one out, pull one in, pull one out, pull one in." (Ex. H, p. 92) Tysor performed his duties at waist or chest level and he was paid $11.00 per hour. (Tr., p. 67; Ex. H, p. 93) Tysor did not experience any work injuries at Kawasaki. (Ex. H, p. 93) Tysor had a difficult time getting to work in the wintertime and he was terminated for absenteeism by Kawasaki four to five months after he was hired. (Tr., pp. 13, 67; Ex. H, p. 93)

In May 2011 Hull Trailers hired Tysor to wire car trailers, including the brakes, and lights. (Tr., pp. 14, 16; Ex. H, p. 93) Tysor's position required him to bend on his knees "most of the time from one end all the way around to the other, put all the lights on the brakes, the boxes that run everything, plug-ins, just to do the wiring for the whole thing." (Ex. H, p. 93) Tysor did not have any difficulty learning his job tasks. (Ex. H, p. 93) Tysor received a regular production bonus during his employment with Hull Trailers and he worked regular overtime. (Tr., pp. 14-17)

Approximately four to five months after he started working for Hull Trailers, Tysor started painting the trailers. (Tr., p. 16; Ex. H, p. 93) Tysor scraped the trailers, inspected the welding, washed the trailers, dried the trailers, and used paint and primer. (Ex. H, p. 93) Tysor also learned how to use a forklift and became a certified forklift driver. (Tr., p. 59; Ex. H, pp. 90, 93)

On July 15, 2013, Tysor was driving a forklift and he went to pull out a trailer he had just painted. (Tr., p. 17; Ex. H, p. 95) The forklift hit some gravel and the forklift mechanism broke, causing the forklift to flip over and fall on Tysor's right foot. (Tr., pp. 17-19; Ex. H, p. 95) Tysor did not have any previous injuries to his right lower extremity. (Ex. H, pp. 95-96)

Hull Trailers called emergency personnel. (Ex. 1, p. 1) The emergency personnel documented Tysor's right foot was "degloved from the ankle down with the bones exposed and the flesh hanging off the bottom of his foot." (Ex. 1, p. 1) Tysor was taken to Clarinda Regional Health Center where he was diagnosed with a right foot crush injury. (Ex. 1, p. 1) Medical staff documented Tysor had been transporting a load when one of the forks on the forklift broke or fell off, causing the forklift to tip over onto his right leg. (Ex. 2, p. 1) After arriving at the hospital, Tysor was transferred to Creighton University Medical Center ("Creighton") for trauma care by helicopter. (Tr., p. 20; Ex. 2, p. 3)

Creighton staff noted Tysor had a "[n]ear total amputation of the right forefoot and right forefoot pain." (Ex. 2, p. 5) An x-ray of the right lower extremity showed "a right mangled forefoot with fractures through the metatarsals 2 through 5 and a partial calcaneal fracture. There was a missing mid and distal phalanx on the first and second digit." (Ex. 2, p. 6) On July 15, 2013, Amardip Bhuller, M.D., assessed Tysor under anesthesia and recommended a below-the knee amputation. (Exs. 3, p. 1; Ex. 6, p. 7) That same day, Casey Beran, M.D., assessed Tysor with a traumatic amputation, degloving right foot and ankle, and he performed a right below-the knee amputation. (Tr., p. 20; Ex. 5, pp. 3-7) Tysor's amputation occurred above the ankle "but right about where it meets the calf" in the middle of his shin. (Tr., p. 21) After his amputation, Tysor was prescribed Benadryl, gabapentin, hydrocodone-acetaminophen, Oxycodone, and Senna. (Ex. 5, p. 2) Tysor was hospitalized for two and a half days. (Tr., p. 21)

After his amputation, Tysor used crutches and a wheelchair to ambulate. (Tr., p. 22) During a follow-up appointment with Dr. Beran on August 7, 2013, Tysor continued to have pain in his lower right leg. (Ex. 5, pp. 3, 9) Dr. Beran assessed Tysor with a complete traumatic amputation of the foot and superficial cellulitis, refilled his pain medication and gabapentin, and prescribed Bactrim. (Ex. 5, pp. 3, 9) Tysor continued to complain of sharp pain in his wound and cultures from his wound revealed he had a staph infection, which later was debrided. (Ex. 6, pp. 10-12)

On September 4, 2013, Tysor attended an appointment with Dr. Beran. (Ex. 5, p. 16) Dr. Beran documented Tysor reported his wound was better and he noted Tysor could follow up with a prosthetic specialist for measuring and fitting of a prosthesis in two weeks. (Ex. 5, pp. 16-18)

During his follow-up appointment on October 2, 2013, Dr. Beran documented Tysor was doing better, he was continuing to decrease his pain medication, and he was ready to start wearing a prosthesis. (Ex. 5, p. 22) Tysor testified he started fitting for a prosthesis approximately four months after his injury. (Tr., pp. 22, 25)

Dr. Beran referred Tysor to Shenandoah Medical Center Mental Health Services ("Shenandoah MHS") for a psychiatric evaluation. (Ex. 6, p. 1) Tysor was put on a waiting list to see Michael Egger, M.D., a psychiatrist at Shenandoah MHS. (Tr., p. 27) Tysor did not see Dr. Egger, and he was referred to Rose Walter, ARNP. (Ex. 6, p. 1) During Tysor's initial appointment on November 1, 2013, Walter documented:

> Robert has had panic attacks in the past but was always able to control them through positive thinking. Since the foot amputation, he has been having disabling panic attacks. He often awakens in a panic. He recently went to his daughter's school event and had to bolt out due to panic and feeling that he must escape immediately. He avoids going in stores or anywhere there are crows of people due to panic. Traffic has not been a problem for him. During a panic attack, he gets sweaty, queasy, and shaky.

> Robert has some symptoms of generalized anxiety including excessive worry, fatigue, irritability, and feeling keyed up. He falls asleep without difficulty but then awakens frequently and his mind races so that he cannot fall back asleep.

(Ex. 6, p. 1) Walter prescribed alprazolam and psychotherapy with Jan Wilson, LMHC. (Ex. 6, pp. 2-3) Before his work injury Tysor had not received any ongoing care from a psychiatrist or psychologist. (Tr., p. 24)

During his November 13, 2013 appointment with Dr. Beran, Tysor reported he was experiencing phantom pain that was worse at night and throbbing pain and color changes in his stump due to negative pull. (Ex. 5, pp. 25-27)

Tysor returned to Walter on November 22, 2013. (Ex. 6, p. 4) Walter documented she had diagnosed Tysor with "panic with agoraphobia and anxiety disorder." (Ex. 6, p. 4) The medication she prescribed caused him gastrointestinal distress and he discontinued the medication. (Ex. 6, p. 4) Walter documented Tysor was staying in his bedroom and mostly in bed. (Ex. 6, p. 4) Tysor had not attended psychotherapy, due to illness, and he received a prescription for Cymbalta. (Ex. 6, p. 4) Walter diagnosed Tysor with panic with agoraphobia, an anxiety disorder, not otherwise specified, a history of polysubstance abuse, and a history of heroin addiction. (Ex. 6, p. 4)

When Tysor attended a follow up appointment with Walter on December 6, 2013, Tysor reported he was experiencing nightmares of being in prison. (Ex. 6, p. 6) Tysor reported he was isolating himself in the bedroom and his family was under financial distress. (Ex. 6, p. 6) Walter discontinued Cymbalta and prescribed Pristiq. (Ex. 6, p. 6) On January 4, 2014, Walter restricted Tysor from working "until his panic and anxiety are adequately controlled." (Ex. 6, p. 12)

During his follow-up appointment on February 3, 2014, Tysor relayed he was not benefitting from Pristiq, and he reported he had a panic attack while he was at the prosthesis center in Omaha when he looked at himself in the mirror and realized his leg was gone. (Ex. 6, p. 17) Walter documented Tysor had "a fair amount of pain associated with his stump" and he was experiencing nightmares almost every night. (Ex. 6, p. 17) Walter discontinued the Pristiq and prescribed sertraline. (Ex. 6, p. 17)

During his March 21, 2014 appointment with Walter, Tysor reported the sertraline had not helped. (Ex. 6, p. 23) Walter discontinued the sertraline, and prescribed prazosin at bedtime, and Bupropion XL. (Ex. 6, p. 23) Tysor reported he was still having some difficulty looking at his leg with the amputation. (Ex. 6, p. 23)

Walter sent a letter to GENEX Services, Inc. on March 27, 2014, noting that she had treated Tysor for five months, and the treatment had not been successful in resolving or remitting his symptoms. (Ex. 6, p. 27) Walter noted while Tysor was

desirous of returning to work she believed his condition had not improved sufficiently to return to work, and she recommended three more months of treatment. (Ex. 6, p. 27)

During his follow-up appointment on April 24, 2014, Tysor reported the Bupropion was not working, and he was feeling more irritable. (Ex. 6, p. 32) Walter discontinued the medication and prescribed alprazolam ER at bedtime. (Ex. 6, p. 32)

Tysor returned to Dr. Beran on April 25, 2014, complaining of pain in his stump aggravated by weight bearing. (Ex. 5, p. 29) Dr. Beran discussed injecting cortisone into the scar tissue and possible removal of the scar tissue. (Ex. 5, p. 31) Dr. Beran imposed work restrictions of minimal walking, no climbing, no hazardous duty, and no duties without rest breaks, up to eight hours per day for sedentary type work only, or four hours per day with frequent breaks as needed. (Ex. 5, p. 32)

Bruce Gutnik, M.D., L.L.C., conducted a psychiatric diagnostic evaluation of Tysor on May 22, 2014, for Hull Trailers and Travelers. (Ex. A-1) Dr. Gutnik examined Tysor and reviewed his medical records. (Ex. A-1, p. 1) Dr. Gutnik opined with a reasonable degree of medical certainty that "Tysor has an Unspecified Depressive Disorder with Anxious Distress," a history of opioid use disorder in remission, and "probably has Cluster B Personality Disorder." (Ex. A-1, p. 8) Dr. Gutnik found that Tysor's prognosis for recovery was excellent with ongoing treatment for anxiety and depression. (Ex. A-1, p. 8)

Dr. Gutnik responded to a series of questions concerning Tysor's condition. (Ex. A-1, pp. 8-10) When questioned about his current disability, Dr. Gutnik responded, "Mr. Tysor remains anxious, depressed, and continues to be in significant pain. Psychiatrically, he is not sleeping well, his energy level is low, and he has significant anxiety and anger issues. These should be brought under control before he returns to work." (Ex. A-1, p. 9) Dr. Gutnik opined that Tysor would benefit from a combination of medications and psychotherapy. (Ex. A-1, p. 9) Dr. Gutnik found that Tysor was not able to return to work due his degree of anxiety, depression, and underlying unresolved anger. (Ex. A-1, p. 10)

Tysor attended an appointment with Walter on June 30, 2014, and she prescribed Brintellix. (Ex. 6, pp. 38-39) Tysor reported he was not sleeping and he had stopped taking alprazolam. (Ex. 6, p. 38)

Following his appointment on July 16, 2014, Dr. Beran noted Tysor could return to light duty work with no lifting greater than twenty-five pounds and no stooping, twisting, bending, squatting, climbing or hazardous duties. (Ex. 5, p. 39) During Tysor's appointment on September 9, 2014, Walter released him to return to work, finding he had tolerated working half days. (Ex. 6, p. 48)

Tysor returned to work at Hull Trailers in September 2014, and worked four-hour shifts for a few weeks. (Tr., p. 34; Ex. H, p. 93) Hull Trailers assigned Tysor to be a foreman where he was in charge of painting, flooring, and wiring. (Tr., p. 68; Ex. H, p.

93) Tysor supervised nine or ten employees. (Tr., p. 68; Ex. H, p. 100) The first few weeks Tysor worked half-days, until he progressed to full-time. (Ex. H, p. 94) Tysor was still able to paint at times. (Ex. H, p. 93)

On September 17, 2014, Walter opined that Tysor would need to continue taking Buspirone and Brintellix for at least six months and longer if his panic symptoms continued. (Ex. 6, p. 50) Walter increased Tysor's Buspirone dosage on October 23, 2014, and opined he would need psychotherapy and medication management for at least six more months because his "panic continued to be problematic." (Ex. 6, p. 56)

Tysor experienced skin breakdown on the posterior aspect of his right lower limb. (Ex. 8, p. 3) On September 29, 2014, Mark Maguire, C.P.O., examined Tysor, and advised that he stay off of his prosthesis as much as possible, apply ice, take anti-inflammatory medication, and dispensed a gel pad to wear with his prosthesis. (Ex. 8, p. 3) John Boldt, C.P.O., issued a letter on October 1, 2014, restricting Tysor from working if his work required use of his prosthesis through October 6, 2014. (Ex. 8, p. 3) Boldt reexamined Tysor and excused him from employment from October 13, 2014 through October 14, 2014, due to a problem with his prosthesis. (Ex. 8, p. 4)

Dr. Gutnik reexamined Tysor in February 2015, and reviewed his medical records. (Ex. A-2, p. 11) Dr. Gutnik opined Tysor has an "Unspecified Depressive Disorder with Anxious Distress which is under good control with current medications," an opioid use disorder that is in remission, and "a Probable Cluster B Personality Disorder." (Ex. A-2, pp. 14-15) Dr. Gutnik noted Tysor had been improving over the past year with his regimen of psychiatric care, but he "remains anxious and obsesses over his inability to protect and take care of his family, particularly at night when he is not wearing his prosthesis. He has not fully accepted his injury and limitations. He has gone a long way toward this end, but I believe another 6 months to a year of current treatment would be necessary to bring him to MMI." (Ex. A-2, p. 15)

On March 30, 2015, Dean Wampler, M.D., performed an independent medical examination of Tysor for Hull Trailers and Travelers. (Ex. 7) Dr. Wampler reviewed Tysor's medical records and examined him. (Ex. 7, p. 1) Dr. Wampler diagnosed Tysor with a crush and degloving injury to the right foot and ankle that resulted in a below-knee amputation, and noted he had been treated for an anxiety disorder. (Ex. 7, p. 4) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Wampler found,

> For amputation, table 17-32 on page 545 indicates that a below-knee amputation with more than three inches of lower extremity remaining, such as in Mr. Tysor, is 70% lower extremity impairment.
>
> Mr. Tysor also has abnormal nerve pain related to this condition that requires long term medications. Instructions for this type of peripheral nerve pain are taken from table 13-23 on page 346. The table's instructions also directs the examiner to table 17-37 on page 552 to

> identify that the maximum sensory impairment for the sural and common peroneal nerves are 5% lower extremity each. Because Mr. Tysor's nerve pain is not constant but can limit physical activity at times, 50% of the maximum value is used as instructed by table 13-34. Therefore, each of these nerves contributes 2.5% (rounded up to 3%) lower extremity impairment. These values are combined for a total of 6% lower extremity impairment due to nerve pain.
>
> The values of 70 and 6 are *combined* utilizing Combined Values Chart in the Appendix of the *AMA Guides* to identify that Mr. Tysor sustained a total of 72% permanent partial impairment of his right lower extremity as a result of injuries sustained on July 15, 2013.

(Ex. 7, p. 4) Dr. Wampler found Tysor does not require any permanent work restrictions as a result of his work injury, but that he will require gabapentin for the foreseeable future and refitting of the suction cup of the prosthesis. (Ex. 7, p. 5)

On May 27, 2015, Tysor attended an appointment with Jennifer Stirgwolt, D.O., a family practice physician. (Ex. 9, p. 1; Tr., p. 41) Dr. Stirgwolt found Tysor developed cellulitis due to friction from his prosthesis and was unable to wear his prosthesis. (Ex. 9, p. 1) Dr. Stirgwolt opined Tysor should be able to return to work on June 1, 2015, after the swelling was improved. (Ex. 9, p. 2) Tysor's swelling did not improve as expected and Dr. Stirgwolt restricted Tysor from working four to six weeks on June 12, 2015. (Ex. 9, p. 5)

Tysor returned to work as a foreman. (Ex. H., p. 93) Hull Trailers terminated Tysor's employment on July 16, 2015. (Tr., p. 36; Ex. H, p. 93) Tysor reported that an individual named Mike Cruise called him into the office that day and told him he was being demoted to wiring trailers. (Tr., p. 35; Ex. H, p. 100) Tysor testified he responded he could not work on his knees, and stated "[i]f you're going to do that, you might as well fire me, you know. I mean it's the same thing. I can't do it. And he said all right, well, you're fired." (Ex. H, p. 100)

After his termination Tysor went to Manpower, a temporary agency, but he was not successful in finding employment. (Ex. H, p. 94) Tysor received unemployment benefits for a period of time. (Ex. H, p. 94) Tysor applied for forklift driver positions, and stocking positions, but he was not hired. (Tr., pp. 74-75; Ex. H, p. 94)

In September 2015, Tysor applied for vocational rehabilitation services in Missouri. (Tr., pp. 36-37; Exs. 10, p. 1; H, pp. 95, 100) At the time of the hearing Tysor was still receiving vocational rehabilitation services. (Ex. H, p. 91) Tysor is enrolled in an online appliance repair program through Penn Foster. (Tr., p. 59; Ex. H, p. 91) The program lasts up to a year. (Ex. H, p. 91)

Dr. Gutnik reevaluated Tysor and examined his medical records in November 2015. (Ex. A-3, p. 16) Dr. Gutnik responded to questions posed by counsel for Hull Trailers and Travelers, and opined "Tysor no longer appears to have his Depressive Disorder with Anxious Distress. He has a history of Opioid Use Disorder and probable Other Specified Personality Disorder with Cluster B Traits." (Ex. A-3, p. 20) Dr. Gutnik found Tysor has no permanent psychiatric impairment as a result of his injury. (Ex. A-3, p. 20) As far as future care is concerned, Dr. Gutnik opined:

> Mr. Tysor appears to have come to an acceptance of his injury and subsequent amputation. He his [*sic*] optimistic about his future. He has benefited from both psychotherapy and his current medication regimen. Obviously, his amputation is permanent and there will be times when he needs to cope with limitations. At those times, brief psychotherapy may be appropriate. However, ongoing psychotherapy on a regular basis is not necessary as a result of his injury. It is helpful, for his Other Specified Personality Disorder with Cluster B Traits. This is not a result of the accident.

(Ex. A-3, p. 20)

Tysor attended an appointment with Walter on December 9, 2015. (Ex. 6, p. 69) Walter opined Tysor was stable from a psychiatric perspective and did not alter his medications, noting he was taking Quetlapine at bedtime, Brintellix, Buspirone, and alprazolam. (Ex. 6, p. 70)

As part of his treatment Walter referred Tysor for cognitive behavioral therapy with Wilson and he received therapy on December 11, 2013, December 18, 2013, January 6, 2014, January 22, 2014, February 11, 2014, February 27, 2014, March 26, 2014, April 9, 2014, April 23, 2014, May 21, 2014, June 4, 2014, July 15, 2014, July 29, 2014, August 7, 2014, October 8, 2014, March 12, 2015, May 5, 2015, July 7, 2015, September 22, 2015, October 28, 2015, November 25, 2015, December 9, 2015. (Ex. 6, pp. 8-11, 13-16, 19-22, 25-26, 28-31, 34-37, 40-43, 45-46, 51-52, 57-68)

Walter examined Tysor on April 28, 2016. (Ex. 6, p. 71) Walter assessed Tysor with panic disorder, agoraphobia, disruptive mood dysregulation disorder, and unspecified anxiety disorder. (Ex. 6, p. 71) Walter reported Tysor was taking Brintellix, Buspirone, alprazolam, and hydroxyzine pamoate. (Ex. 6, p. 72)

Tysor attended an appointment with Walter on July 26, 2016. (Ex. 6, p. 74) Walter listed a diagnostic impression of panic disorder, agoraphobia, disruptive mood dysregulation disorder, insomnia, unspecified anxiety disorder, and a history of polysubstance abuse and heroin addiction, both in remission. (Ex. 6, p. 74) Walter noted Tysor was stable and his medications were working. (Ex. 6, p. 74) Walter prescribed Brintellix, Buspirone, alprazolam, as needed, and hydroxyzine as needed. (Ex. 6, p. 75)

On September 13, 2016, Walter issued an opinion letter, diagnosing Tysor with panic disorder and agoraphobia. (Ex. 6, p. 76) Walter noted, "[i]n my opinion, this diagnosis is related to the traumatic injury he suffered on July 15, 2013. His condition is permanent and will not resolve in the foreseeable future. He will need continued care and treatment for panic disorder on a long-term basis. This will include medication management and psychotherapy." (Ex. 6, p. 76) Walter reported she could not give an impairment rating, and determined Tysor reached maximum medical improvement from a psychiatric perspective on April 28, 2016. (Ex. 6, pp. 76-77)

At hearing Tysor testified he entered into a verbal contract with an individual named Gary Kirkpatrick to repair cars and appliances. (Tr., p. 60; Ex. H, p. 91) Kirkpatrick purchases old cars and Tysor fixes the cars. (Ex. H, p. 91) Tysor has learned to repair cars by watching YouTube and operates a computer diagnostic reader. (Tr., pp. 60, 66; Ex. H, p. 91) Tysor performs mechanic work, bodywork, and uses an air brush to paint the vehicles. (Ex. H, p. 92) Kirkpatrick sells the vehicles and he shares the profits with Tysor. (Ex. H, p. 92)

Tysor also owns homes in the community he has rehabilitated and leases to tenants. (Tr., p. 75-76; Ex. H, p. 91) Tysor has purchased three homes that he has repaired. (Tr., p. 63) Tysor learned to repair floors, electrical wiring, and plumbing, install carpet and drywall, and frame windows. (Tr., pp. 63-64; Ex. H, p. 91) At the time of his deposition Tysor owned two rental homes, and had acquired a third home he was working on. (Ex. H, pp. 91-92) Tysor reported that when he works on the homes, he modifies his duties so he can sit down to work. (Ex. H, p. 97)

Tysor testified that he had not been treated for psychiatric problems before his work injury. (Ex. H, p. 96) Before his work injury Tysor enjoyed running and would run ten miles every other day. (Ex. H, p. 97) Tysor reported that since his accident he is not able to run. (Ex. H, p. 97)

At the time of the hearing Tysor continued to take gabapentin for phantom pain and hydrocodone. (Tr., pp. 42-43) Tysor takes gabapentin daily, but limits his use of hydrocodone because of his past addiction to heroin. (Tr., pp. 44-46) Tysor testified he continues to take Trintellix for depression and anxiety, Xanax for anxiety and to help with sleep, and Buspirone for the side effects of his medication. (Tr., p. 48)

When questioned about his problems, Tysor testified,

> Physically, physically I'm healthy as an ox, you know There's a lot of, you know, things that I can't do. There's a lot of things, that you know, I need help with; carrying heavy stuff, doing things.
>
> Mentally, man, I'd like to think I'm all right but, you know, I mean sometimes, sometimes a day shows up where it just shows you man, maybe you're not. I don't know, you know.

(Tr., p. 51)

CONCLUSIONS OF LAW

I. Nature of the Disability

The parties have stipulated that Tysor sustained a work-related injury to his right lower extremity resulting in a below-the-knee amputation. Tysor avers he has also sustained a mental health sequela injury. Hull Trailers and Travelers contend Tysor has failed to prove he sustained a compensable mental health sequela injury.

An injury to one part of the body can later cause an injury to another. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 16-17 (Iowa 1993) (holding a psychological condition can be caused or aggravated by a scheduled injury). The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

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 deputy 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).

After examining Tysor and reviewing his medical records, Dr. Gutnik, a psychiatrist, diagnosed Tysor with unspecified depressive disorder with anxious distress, a history of opioid use in remission, and probable Cluster B personality disorder. (Ex A-1, pp. 1, 8) Dr. Gutnik initially found Tysor's prognosis for recovery was excellent with ongoing treatment for anxiety and depression. (Ex. A-1, p. 8)

In February 2015, Dr. Gutnik reexamined Tysor and reviewed his medical records, and diagnosed Tysor with unspecified depressive disorder with anxious distress, a history of opioid use in remission, and probable Cluster B personality disorder. (Ex. A-2, pp. 11, 15) Dr. Gutnik noted Tysor had been improving over the past year with his regimen of psychiatric care, but he "remains anxious and obsesses over his inability to protect and take care of his family, particularly at night when he is

not wearing his prosthesis. He has not fully accepted his injury and limitations. He has gone a long way toward this end, but I believe another 6 months to a year of current treatment would be necessary to bring him to MMI." (Ex. A-2, p. 15)

Tysor returned to Dr. Gutnik in November 2015, and Dr. Gutnik opined, "Tysor no longer appears to have his Depressive Disorder with Anxious Distress. He has a history of Opioid Use Disorder and probable Other Specified Personality Disorder with Cluster B Traits." (Ex. A-3, p. 20) Dr. Gutnik found Tysor has no permanent psychiatric impairment as a result of his work injury. (Ex. A-3, p. 20) As far as future care is concerned, Dr. Gutnik opined:

> Mr. Tysor appears to have come to an acceptance of his injury and subsequent amputation. He his [*sic*] optimistic about his future. He has benefited from both psychotherapy and his current medication regimen. Obviously, his amputation is permanent and there will be times when he needs to cope with limitations. At those times, brief psychotherapy may be appropriate. However, ongoing psychotherapy on a regular basis is not necessary as a result of his injury. It is helpful, for his Other Specified Personality Disorder with Cluster B Traits. This is not a result of the accident.

(Ex. A-3, p. 20)

Walter, a psychiatric advanced nurse practitioner, first started treating Tysor in November 2013. (Ex. 6) Walter documented she had diagnosed Tysor with "panic with agoraphobia and anxiety disorder," prescribed psychiatric medication, and referred him for psychotherapy. (Ex. 6, p. 4) Tysor continued to receive regular psychiatric treatment from Walter into 2016. (Ex. 6)

On September 13, 2016, Walter issued an opinion letter, diagnosing Tysor with panic disorder and agoraphobia. (Ex. 6, p. 76) Walter noted, "[i]n my opinion, this diagnosis is related to the traumatic injury he suffered on July 15, 2013. His condition is permanent and will not resolve in the foreseeable future. He will need continued care and treatment for panic disorder on a long-term basis. This will include medication management and psychotherapy." (Ex. 6, p. 76) Walter reported she could not give an impairment rating, and she determined Tysor reach maximum medical improvement from a psychiatric perspective on April 28, 2016. (Ex. 6, pp. 76-77)

I find Tysor has sustained a mental health sequela injury. While Tysor experienced other stressors, including his previous incarceration and the rape and attempted rape of his stepdaughters, psychiatric struggles and drug use by family members, Tysor testified that he had not been treated for psychiatric problems before his work injury. (Tr, pp. 89-90, 93; Exs. H, pp. 96, 99; 6, p. 13). There was no evidence presented to the contrary at hearing. Within four months of his work injury Tysor commenced treatment with a psychiatric nurse practitioner. Dr. Gutnik initially diagnosed Tysor with unspecified depressive disorder with anxious distress. (Ex A-1,

pp. 1, 8) Walter diagnosed Tysor with panic disorder and agoraphobia and prescribed a variety of medications. (Ex. 6, p. 76) Walter has opined Tysor suffers from a permanent mental health impairment and that his condition will not resolve in the foreseeable future. Tysor testified that at the time of the hearing he continues to take Brintellix for depression and anxiety, Xanax for anxiety and to help with sleep, and Buspirone for the side effects of his medication. (Tr., p. 48) Walter has provided psychiatric treatment to Tysor over several years.

Dr. Gutnik performed independent medical examinations for Tysor and found Tysor benefitted from psychotherapy and his "current medication regime." (Ex. A-3, p. 20) While Dr. Gutnik found Tysor no longer met the diagnosis of unspecified depressive disorder with anxious distress during his November 2015 examination, he also acknowledged "there will be times when he needs to cope with limitations [related to his amputation]. At those times, brief psychotherapy may be appropriate." (Ex. A-3, p. 20) Dr. Gutnik notes Tysor may need additional psychotherapy related to his amputation in the future. Dr. Gutnik also documented Tysor was taking Buspirone 20 mg two times per day, Alprazolam 0.5 mg as needed in decreasing doses, Brintellix 20 mg per day, hydrocodone for pain, and Seroquel, as needed for sleep. (Ex. A-3, p. 17) In his analysis regarding Tysor's psychiatric medications, Dr. Gutnik does not discuss Tysor's use of Brintellix, and opined "I can not determine at this time whether or not his medications can be tapered. Time will tell." (Ex. A-3, pp. 20-21) Dr. Gutnik did not recommend Tysor's Brintellix be discontinued. If Dr. Gutnik believed Tysor no longer has depression or anxiety, it is unclear why he did not opine the medication should be discontinued. I do not find his opinion persuasive. Based on the record evidence, I find Tysor has sustained a permanent mental health sequela injury.

II. Extent of Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Pease, 807 N.W.2d at 852. In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (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 shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

Using the AMA Guides, Dr. Wampler found Tysor sustained a seventy-two percent permanent partial impairment of his right lower extremity as a result of the work injury sustained on July 15, 2013. (Ex. 7, p. 4) Dr. Wampler found Tysor does not require any permanent work restrictions as a result of his work injury, but that he will require gabapentin for the foreseeable future and refitting of the suction cup of the prosthesis. (Ex. 7, p. 5) As analyzed above, Tysor also sustained a permanent mental health sequela injury as a result of his work condition. No expert witness provided an impairment rating for his mental health sequela condition.

At the time of the hearing Tysor was not employed. Tysor was incarcerated for much of his adult life. Tysor has many transferable skills. Tysor is an avid reader and has read thousands of books. (Tr., p. 57; Ex. H, pp. 89-90) Tysor is bilingual and speaks fluent Spanish and English. (Tr., p. 57; Ex. H, p. 90) While he was in prison, Tysor tutored inmates in English and Spanish on adult basic education. (Tr., pp. 57-58; Ex. H, p. 90)

Tysor has always been good at fixing things and has "always tinkered." (Ex. H, pp. 90-91) While he was in prison Tysor repaired weight equipment and radios. (Ex. H, pp. 90-91) Tysor was able to quickly grasp his job duties with Kawasaki and Hull Trailers. He is able to repair cars by watching YouTube videos and he taught himself how to operate a computer diagnostic reader. (Tr., pp. 60, 66; Ex. H, p. 91) Tysor performs mechanical work, bodywork, and uses an air brush to paint the vehicles. (Ex. H, p. 92) Tysor is currently enrolled in an online appliance repair program through Penn Foster and he has entered into an agreement with partner to repair vehicles and appliances. (Tr., p. 59; Ex. H, p. 91)

Tysor owns homes in the community he has repaired and leases to tenants. (Tr., p. 75-76; Ex. H, p. 91) Tysor has purchased three homes that he has repaired. (Tr., p. 63) Tysor taught himself how to repair floors, electrical wiring, plumbing, install carpet and drywall, and frame windows. (Tr., pp. 63-64; Ex. H, p. 91) At the time of his deposition Tysor owned two rental homes, and had recently acquired a third home he was working on. (Ex. H, pp. 91-92) Tysor reported that when he works on the homes, he modifies his duties so he can sit down to work. (Ex. H, p. 97) In considering the factors of industrial disability, including Tysor's functional disability, age, education, qualifications, experience, and ability to engage in similar employment, I find Tysor has sustained a forty percent industrial disability.

In his post-hearing brief, Tysor avers the correct commencement date for permanent partial disability benefits is November 11, 2015. At hearing, the parties stipulated the correct commencement date for permanent partial disability benefits is September 15, 2014 on the Hearing Report. The correct commencement date for permanency is September 15, 2014, the date when Tysor first returned to work. Evenson v. Winnebago Indus., Inc., 881 N.W.2d, 360, 372-74 (Iowa 2016) (noting the statute provides the healing period lasts until the claimant has returned to work, the claimant has reached maximum medical improvement, or until the claimant is medically

capable of returning to substantially similar employment, "whichever occurs first" and finding the claimant returned to work first, and permanent partial disability benefits commenced on his first return to work).

III. Rate

At hearing the parties disputed the number of exemptions Tysor is entitled to and his weekly benefit rate. In his post-hearing brief, Tysor avers he is single and entitled to two exemptions. Hull Trailers and Travelers contend Tysor is single and entitled to one exemption.

Tysor submitted his 2013 income tax return, which was jointly filed with Loretta Tysor, claiming three dependents, Grace Peck, Hannah Blank, and Dawn Hurley. (Ex. 14) Tysor testified he was not married to Loretta Tysor at the time of his injury. (Tr., p. 52) Tysor also testified that the three children listed on his income tax return were his eventual stepchildren. (Tr., p. 52) The evidence supports Tysor was single and entitled to one exemption at the time of his injury.

Tysor claims his rate should be based on base pay of $7,051.57, with overtime of $1,007.17, and a production bonus of $987.49, for a total of $9,046.23, divided by thirteen, for an average weekly wage of $695.86. (Ex. 12) Hull Trailers and Travelers aver Tysor's average weekly wage should not include the bonus income, which is irregular.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The statute expressly provides the determination is made using "the last 13 consecutive calendar weeks immediately preceding the injury." Iowa Code § 85.36(6). The basis of compensation shall be the "weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. "Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed . . . rounded to the nearest dollar." Id. The term "gross earnings" is defined as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." Id. § 85.61.

While working for Hull Trailers, Tysor was paid on an hourly basis and he received overtime. When an employee is paid on an hourly basis, the weekly earnings are computed "by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay," the employee earned in the last thirteen consecutive calendar weeks immediately preceding the injury. Id. § 85.36(6). Rule 876 Iowa Administrative Code 8.2, provides,

> The word "overtime" as used in Iowa Code section 85.61 means amounts due in excess of the straight time rate for overtime hours. Such amount shall not be considered in determining weekly wages within Iowa Code section 85.36. Overtime hours at the straight time rate are included in determining gross weekly earnings.

Thus, under the administrative rule, overtime hours are multiplied by the straight time rate when determining gross weekly earnings.

Tysor's Exhibit 12 does not show the hours he worked per week. Defendants' Exhibit C shows the hours Tysor worked per week for the thirteen weeks prior to his injury. For the first three weeks Tysor earned $13.00 per hour and for the remaining weeks he earned $13.50 per hour. (Ex. C) Hull Trailers and Travelers acknowledged Tysor should have received a raise the third week to $13.50 per hour, and an additional $20.11 should be included in determining his gross weekly earnings. Under rule 876 IAC 8.2, Tysor's gross weekly earnings should be computed using the straight time rate for overtime hours. Week eleven does not contain the correct gross weekly earnings with the correct hourly wage. The correct weekly earnings for week eleven are $649.75. Thus, for the thirteen week period, Tysor earned gross weekly earnings of $8,082.28, divided by thirteen, for average gross weekly earnings of $621.71.

Hull Trailers and Travelers contend Tysor's bonus income was irregular and should not be included in calculating his average gross weekly earnings. Exhibits 12 and C show that Tysor received regular bonus income for each of the thirteen weeks preceding his injury. Tysor testified the bonus income was regular. Hull Trailers and Travelers did not present any evidence to the contrary. The bonus income should be included in calculating Tysor's average gross weekly earnings. For the period in question, Tysor received bonus income of $987.49. Adding $987.49 to the $8,082.28, results in gross income of $9,069.77, divided by thirteen, for average gross weekly earnings of $697.67. According to the 2013-2014 Ratebook[1], covering July 1, 2013 through June 30, 2014, rounding $697.67 to the nearest dollar, Tysor's weekly benefit rate is $429.18.

IV. Credits

Hull Trailers and Travelers seek a credit for temporary benefits paid at a rate in excess of the weekly rate required by Iowa Code chapter 85. Iowa Code section 85.34(4), provides:

> If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under

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1 http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/2013ratebook.pdf

> section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

The evidence supports Hull Trailers and Travelers paid Tysor temporary disability benefits at rates below his established weekly benefit rate. No overpayment occurred.

IV. Costs

Tysor seeks to recover the $100.00 filing fee and $137.60 cost of a deposition transcript. Rule 876 IAC 4.33 outlines the costs that can be taxed, as follows,

> Costs 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, (8) costs of persons reviewing health service disputes.

The rule expressly allows for the recovery of the filing fee and the deposition transcript. $237.60 is taxed to Hull Trailers and Travelers.

ORDER

IT IS THEREFORE ORDERED, that:

Hull Trailers and Travelers shall pay Tysor two hundred (200) weeks of permanent partial disability benefits, commencing on September 15, 2014, at the rate of four hundred twenty-nine and 18/100 dollars ($429.18).

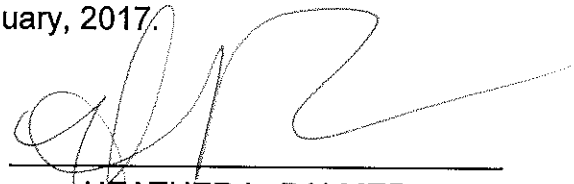
Hull Trailers and Travelers shall pay accrued benefits in a lump sum, with interest.

Hull Trailers and Travelers are entitled to a credit for benefits previously paid.

Hull Trailers and Travelers shall reimburse Tysor one hundred and 00/100 dollars ($100.00) for the filing fee, and one hundred thirty-seven and 60/100 dollars ($137.60) for the deposition transcript.

Hull Trailers shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 31st day of January, 2017.



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HLP/kjw

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.