

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD R. TURNER,

Claimant,

vs.

NCI BUILDING SYSTEMS, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE
COMPANY,Insurance Carrier,
Defendants.

File No. 1652235.01

A P P E A L

D E C I S I O N

Head Notes: 1402.40; 1402.60; 1803;
1803.01; 2502; 2903; 4000.2

Claimant Donald Turner appeals from an arbitration decision filed on February 24, 2022. Defendants NCI Building Systems, Inc., employer, and its insurer, Liberty Mutual Insurance Company, cross-appeal. The case was heard on May 11, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 16, 2021.

At the start of the arbitration hearing, claimant's counsel requested the opportunity to leave the record open for receipt of a report from a pain evaluation scheduled for May 17, 2021. The deputy commissioner denied the request. (Transcript p. 16) Claimant filed a renewed motion to admit evidence or, in the alternative, submit an offer of proof on June 10, 2021, seeking admission of the May 17, 2021, report from Beth Dinoff, Ph.D., a psychologist with the University of Iowa Hospitals and Clinics (UIHC). Defendants resisted the motion.

In the arbitration decision, the deputy commissioner found the report from Dr. Dinoff should not be admitted into the record. The deputy commissioner found claimant sustained 40 percent industrial disability as a result of the work injury, which entitles claimant to receive 200 weeks of permanent partial disability (PPD) benefits, commencing on July 8, 2019. The deputy commissioner ordered defendants to pay claimant \$3,800.00 in penalty benefits. Pursuant to Iowa Code section 85.39, the deputy commissioner ordered defendants to reimburse claimant in the amount of

\$3,987.50 for the cost of the independent medical examination (IME) of claimant performed by Mark Taylor, M.D. Pursuant to rule 876 IAC 4.33, the deputy commissioner ordered defendants to reimburse claimant \$127.72 for the filing and service fees, \$169.95 for deposition transcripts, \$95.00 for the January 7, 2021, letter from Dr. Taylor, but the deputy commissioner declined to order defendants to reimburse claimant \$4,000.00 for Dr. Woods' report because the bill was not itemized.

On appeal, claimant asserts the deputy commissioner erred in not admitting Dr. Dinoff's report into the record. Claimant asserts the deputy commissioner erred in finding claimant did not meet his burden of proof to establish he sustained a sequela mental health condition caused by the work injury, and claimant asserts he is entitled to additional industrial disability benefits based on his mental health condition. Claimant asserts the deputy commissioner erred by not identifying claimant's permanent restrictions resulting from the work injury. Claimant asserts the remainder of the decision should be affirmed.

On cross-appeal, defendants assert the deputy commissioner erred in finding claimant sustained industrial disability. In the alternative, defendants assert the award for industrial disability should be reduced substantially. Defendants assert the remainder of the decision should be affirmed.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the arbitration decision filed on February 24, 2022, is affirmed in part, and is reversed, in part, with my additional and substituted analysis.

Without additional analysis, I affirm the deputy commissioner's finding that claimant sustained 40 percent industrial disability as a result of the work injury. I affirm the deputy commissioner's finding that defendants should pay claimant \$3,800.00 in penalty benefits. I affirm the deputy commissioner's finding that defendants should reimburse claimant \$3,987.50 for the cost of Dr. Taylor's IME under Iowa Code section 85.39. Pursuant to rule 876 IAC 4.33, I affirm the deputy commissioner's finding that defendants should reimburse claimant \$127.72 for the filing and service fees, \$169.95 for deposition transcripts, and \$95.00 for the January 7, 2021, letter from Dr. Taylor, and I affirm the deputy commissioner's finding claimant is not entitled to reimbursement for Dr. Woods' report.

With the following additional and substituted analysis, I affirm the deputy commissioner's finding that claimant requires permanent restrictions, but I reverse the deputy commissioner's finding that no specific restrictions should be adopted, I reverse the deputy commissioner's finding that Dr. Dinoff's report should not be admitted into evidence, I reverse the deputy commissioner's finding that claimant failed to prove he sustained a mental health sequela caused by the work injury, and I find claimant has not established the mental health condition is permanent.

Claimant asserts the deputy commissioner erred by failing to identify claimant's permanent restrictions. As noted by the deputy commissioner, Dr. Taylor is the only physician who imposed permanent restrictions. Dr. Taylor recommended claimant have the ability to alternate sitting, standing, and walking as needed for comfort, rare and only partial squatting with something to hold onto to assist, bend and kneel occasionally, rare to occasional stairs and no ladders, noting claimant may tolerate a step or two on a stepladder, but he should generally avoid ladders, occasional overhead reaching and overhead tasks, and a lifting and carrying restriction of 30 pounds, preferably at or above knee level. (Exhibit 1, pp. 15-16)

The deputy commissioner found as follows:

Dr. Taylor is the only physician to recommend specific permanent restrictions; however, Dr. Chen also expressed the opinion that claimant's severe orthopedic injuries may limit his continued ability to perform rigorous physical activities such as a maintenance mechanic. It is clear to the undersigned that claimant requires some form of permanent restrictions. Of the three opinions relating to permanent restrictions, I find the restrictions recommended by Dr. Taylor most accurately reflect claimant's current functional abilities; however, it appears at least some of the restrictions are tethered to conditions unrelated to the work injury. As such, I do not adopt any specific restrictions. I do, however, find that claimant likely requires some form of permanent restrictions.

(Arb. Dec., p. 10)

In reaching his conclusion, the deputy commissioner did not identify what restrictions he believed were tethered to conditions unrelated to the work injury. The deputy commissioner found claimant sustained permanent impairments to his left and right lower extremities, left shoulder, and thoracic spine caused by the August 2018 work injury. Dr. Taylor's restrictions relate to the above conditions. I find the restrictions recommended by Dr. Taylor are claimant's permanent restrictions for the work injury.

Claimant next asserts the deputy commissioner erred in refusing to admit Dr. Dinoff's May 17, 2021, report. With my substituted and additional analysis, I reverse the deputy commissioner's finding that Dr. Dinoff's report should not be admitted into evidence. I find the report should be admitted into the record as Exhibit 10.

In reaching his conclusion the deputy commissioner found:

After significant delay, it appears defendants authorized treatment with a pain psychologist. At hearing, claimant requested that the evidentiary record be left open for receipt of the medical records from claimant's initial evaluation with Beth Dinoff, Ph.D., a pain psychologist from the University of Iowa Hospitals and Clinics. (Hr. Tr., p. 11) The initial evaluation was

scheduled to take place on May 17, 2021, six days after the evidentiary hearing. The undersigned denied claimant's request, noting the evidentiary record reveals Dr. Wikle, an authorized treating physician, recommended claimant receive pain management through a pain psychologist, and defendants had authorized the same. Liability for the requested treatment had clearly been established.

Following the evidentiary hearing, claimant filed a renewed motion to admit evidence, or, in the alternative, made an offer of proof of these records.

To the extent claimant intended to use the medical notes from the May 17, 2021, appointment to establish causation for a mental health sequela, the undersigned determined that the medical notes from the May 17, 2021, appointment would amount to cumulative evidence. Both parties submitted independent psychiatric evaluations, and the evidentiary record was left open so claimant could obtain a rebuttal report from Dr. Woods. These evaluations were performed by psychiatrists who reviewed claimant's medical records, conducted psychiatric evaluations, and were specifically tasked with addressing causation for claimant's alleged psychiatric condition. In comparison, Dr. Wikle referred claimant to Dr. Dinoff, a pain psychologist, "for the psychosocial aspect of pain care through coping skills, relaxation strategies, cognitive group therapy etc." (JE2, p. 86) At the time of hearing, there was no indication that the initial evaluation with Dr. Dinoff was to address causation for the alleged mental health condition.

Moreover, the initial evaluation with Dr. Dinoff had not taken place prior to the evidentiary hearing. Leaving the record open to introduce the initial medical notes and opinions of a new expert would almost certainly result in prejudice to one of the parties and rectifying any such prejudice would likely require leaving the record open for additional time.

For the above reasons, claimant's renewed motion to admit the May 17, 2021, medical record into evidence is denied. The medical record will remain in claimant's file as an offer of proof.

(Arb. Dec., pp. 18-19)

The record in this matter establishes defendants delayed and refused to provide claimant with treatment recommended by authorized treating physicians at UIHC on more than one occasion. Claimant sustained a very serious work injury from falling 30 feet from a scissor lift at work and landing on his feet. During claimant's 22-day hospitalization in August 2018, claimant was diagnosed with acute respiratory failure, a chest contusion, bilateral pneumothoraces requiring placement of bilateral chest tubes,

pneumonia, acute blood loss anemia, closed fractures of multiple ribs, a T5 fracture, a right scapula fracture, a scaphoid fracture, a closed right tibia fracture, right pylon high fibular fractures, left minimally displaced calcaneus and navicular fractures, and a comminuted fracture of the distal tibia. (JE 2) Matthew Karam, M.D., the authorized treating orthopedic surgeon recommended inpatient rehabilitation services for claimant. Defendants refused to authorize the inpatient rehabilitation services.

Following the accident and two surgeries, claimant developed chronic pain in his bilateral lower extremities. Claimant was referred to Justin Wickle, M.D., an anesthesiologist specializing in pain management at UIHC. Dr. Wickle evaluated claimant for the first time on November 18, 2020. (JE 2, p. 80) Dr. Wickle prescribed Cymbalta and referred claimant to "a pain psychologist, for the psychosocial aspect of pain care through coping skills, relaxation strategies, cognitive group therapy, etc." (JE 2, pp. 85-86) Claimant was scheduled to see a pain psychologist at UIHC on December 23, 2020. Defendants refused to authorize the Cymbalta or the referral and the appointment was cancelled. (JE 2, p. 96)

On December 23, 2020, claimant's attorney wrote a letter to defendants' attorney noting claimant's appointment with the pain psychologist at UIHC had been cancelled because defendants had denied authorization and expressing claimant's dissatisfaction with the care defendants were providing. (Ex. 7, p. 56) Claimant filed an application for alternate care under Iowa Code section 85.27, requesting authorization for the appointment with a pain psychologist, as recommended by Dr. Wickle, the authorized pain specialist. Defendants again denied liability, and the application was dismissed pursuant to Iowa Code section 85.27. Defendants eventually authorized the treatment shortly before hearing and an appointment was scheduled for May 17, 2021, which was after the May 11, 2021, arbitration hearing.

The deputy commissioner denied claimant's motion to leave the record open for receipt of Dr. Dinoff's report, finding the report would amount to cumulative evidence, given two experts had offered causation opinions on claimant's alleged mental health sequela. I find the report is not cumulative evidence. The report is for treatment related to the work injury. Claimant did not cause the delay in obtaining the report from Dr. Dinoff. Defendants were responsible for the delay. The report is admitted into the record as Exhibit 10.

Claimant next asserts the deputy commissioner erred in finding claimant failed to prove he sustained a sequela mental health condition caused by the work injury. With my additional and substituted analysis, I reverse the deputy commissioner's finding that claimant failed to prove he sustained a mental health sequela caused by the August 2018 work injury. However, I find claimant has not proven his mental health condition is permanent.

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 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. Willis, 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. 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 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).

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).

Claimant was examined by four mental health providers, Benjamin Tallman, Ph.D., a treating psychologist with UIHC who examined claimant on September 7, 2018, Adam Woods, M.D., a psychiatrist who conducted an IME for claimant on January 7, 2021, Scott Jennisch, M.D., a psychiatrist who conducted an IME for defendants on April 16, 2021, and Dr. Dinoff, a treating pain psychologist who examined claimant on May 17, 2021.

Dr. Tallman examined claimant on a referral from Stanley Mathew, M.D., a psychiatrist, just over a month after the work injury. Dr. Tallman documented at the time of his examination that claimant had a "slightly anxious affect," but no problems with attention, concentration, or memory. (JE 2, p. 36) Claimant reported he had seen a psychologist in the past while going through a divorce and denied feeling depressed or anxious, or having other acute stress symptoms. (JE 2, p. 36) Dr. Tallman found claimant's "mood appears to be predominantly stable with some mild mood fluctuations, including anxiety," and his current coping was appropriate. Dr. Tallman listed a referral diagnosis of adjustment disorder with anxiety and depressed mood, and recommended follow-up on inpatient rehabilitation for monitoring and support as needed. (JE 2, p. 37)

Claimant's medical records from UIHC following Dr. Tallman's September 2018 examination do not document any ongoing mental health concerns through November 2, 2020. (JE 2) Matthew Karam, M.D., a treating orthopedic surgeon documented claimant's mood was normal during his appointment on March 26, 2019. (JE 2, p. 64)

Claimant did not report any mental symptoms until defendant-employer terminated his employment in 2020. (JE 2, p. 74) During an appointment with Dr. Karam on November 3, 2020, Dr. Karam noted claimant reported he had recently been released from work, he was "quite down and demoralized" and his significant discomfort "is affecting the quality of his life." (JE 2, p. 74) Dr. Karam documented claimant appeared "pretty down given the situations in his life," but noted he had "typically demonstrated good coping mechanisms in the past. (JE 2, p. 75)

Claimant attended his first appointment with Justin Wikle, M.D., a treating anesthesiologist specializing in pain management at UIHC, on November 18, 2020, on a referral from Dr. Karam. (JE 2, p. 80) Claimant complained of dull aching pain in his feet with "occasional shooting/electrical 'shock waves' that go through his foot and out through his toes," with associated parathesias. (JE 2, p. 80) Dr. Wikle documented:

Given the various locations as well as the nociceptive nature I am not optimistic any procedural interventions would be helpful for him for any meaningful amount of time. Given this we will trial medications that may help to decrease his pain. The pain has been significant and affecting his mood therefore we will consider Cymbalta which can help with musculoskeletal pain as well as mood. In addition given his nociceptive nature of pain we agree with the addition of an NSAID such as Celebrex. Ultimately he probably will have chronic pain and the goal will be to decrease it as much as possible. In addition we discussed pain psychology. Unfortunately other than the suggestions I do not have a lot of other options.

(JE 2, p. 85)

Dr. Wikle prescribed Cymbalta “[f]or his chronic pain with associated depression,” and advised claimant to see a clinical pain psychologist “for the psychosocial aspect of pain care through coping skills, relaxation strategies, cognitive group therapy etc..” (JE 2, p. 86)

When claimant returned to Dr. Wikle on January 19, 2021, Dr. Wikle noted “[a]nxiety seen in the Pain Clinic initially on 11/18/2020.” (JE 2, p. 93) Dr. Wikle documented claimant had pain on the plantar aspect of both feet with associated numbness and noted, “[h]is mood has been effected by the pain and by being let go by his work.” (JE 2, p. 93) Dr. Wikle noted he had told claimant his pain would be challenging to treat and documented he had not started the Cymbalta and his appointment with the pain psychologist had been cancelled due to a lack of authorization by workers’ compensation. (JE 2, p. 94) Dr. Wikle noted he had discussed pain psychology with claimant “given the fact that he has significant emotional distress related to his injury” and stated he would like to have him evaluated, noting “it seems that his pain is significantly limiting his function.” (JE 2, p. 96) Dr. Wikle again recommended Cymbalta “[f]or his chronic pain with associated depression.” (JE 2, p. 97) Claimant ultimately received the Cymbalta, but it was discontinued due to a sexual side effect. (JE 2, p. 102) Dr. Wikle continued to recommend a referral to a pain psychologist during claimant’s appointment on April 22, 2021, less than a month before the hearing. (JE 2, p. 109)

In responding to a check-the-box letter from defendants’ counsel, Dr Wikle agreed, without providing any comments, to the statement, “[y]our referral to a pain psychologist was not intended to opine that Mr. Turner actually has a psychiatric disorder or that same is connected to the work injury,” he agreed he commonly refers patients to pain psychologists in his practice, and he agreed the referral to a pain psychologist was for a session or two to teach claimant techniques for coping with pain. (Ex. K, pp. 45-46)

Dr. Woods conducted an IME for claimant on January 7, 2021, and issued his report on January 20, 2021. (Ex. 2) Dr. Woods diagnosed claimant with an adjustment

disorder with mixed anxiety and depressed mood. (Ex. 2, p. 29) Dr. Woods documented claimant had no psychiatric history, which is inconsistent with his medical records at UIHC. (Ex. 2, p. 29) Claimant treated for an anxiety disorder and impulse control disorder dating back to July 27, 2016. (Ex. 10, p. 2) There is no evidence claimant was diagnosed with, or treated for, an adjustment disorder prior to the work injury.

Dr. Woods opined claimant is "suffering profound psychiatric symptoms" that are directly attributable to the work injury and primarily caused by his chronic pain. (Ex. 2, pp. 29-30) He also noted another stressor is claimant's daughter's chronic kidney disease. (Ex. 2, p. 30) Dr. Woods opined claimant's depressive and anxiety-based symptoms as a part of his adjustment disorder are causing him to have a low mood, poor concentration, low energy, high irritability causing difficulty with working with others, poor memory, reduced memory capacity, poor sleep, feelings of guilt, and diminished ability for organization, which "would seriously impact his employability and ability to attend work." (Ex. 2, p. 32) Dr. Woods found if claimant's chronic pain is not resolved his adjustment disorder "will be permanent." (Ex. 2, p. 32)

When asked about the delay in the onset of claimant's manifestation of symptoms, Dr. Woods opined:

A bit of a delay of onset of psychiatric symptoms is to be expected, especially in someone who was as physically harmed as was Mr. Turner by his work-related injury. Remember, the causal factor of his Adjustment Disorder is the work-related injury and all the fallout from it, so it took some time for him to attempt to live his life again with demonstrably increased difficulty for the mental health aspect to blossom. However, even though Mr. Turner returned to work for a bit, I do not believe he was perfectly mentally healthy and then his psychiatric symptoms appeared after he was furloughed. That is not accurate. In his interview with this author, Mr. Turner talked about his mental health symptoms profoundly affecting his quality of life even when he was back at work because of his limited ability to be independent, pain free, and do most of things that brought him joy in the past. So, while it is surely accurate his symptoms have gotten worse over time (as noted earlier, he has not received treatment for his mental health symptoms), they have, in fact, been present and affecting him since not long after his work-related injury.

(Ex. 2, p. 33)

Dr. Woods recommended cognitive behavioral therapy on a weekly basis and ongoing evaluation by a psychiatric medication provider for mental health medication management. (Ex. 2, p. 31)

Dr. Jennisch, a psychiatrist, conducted an IME for defendants on April 16, 2021, and issued his report on April 27, 2021. (Ex. N) Dr. Jennisch documented claimant informed him his mental health remained stable during his COVID furlough when he was financially stable. (Ex. N, p. 56) Claimant indicated the loss of his job was a blow to his self-esteem, causing him to lose his health insurance, forcing him to move, causing financial stress, and resulting in social isolation. (Ex. N, p. 56) When asked whether his psychological symptoms were severe enough to interfere with his ability to work claimant responded to Dr. Jennisch, "I don't think so. If I can work, it would help me and help with depression." (Ex. N, p. 56) Dr. Jennisch noted claimant's daughter has severe kidney disease and she recently moved out of claimant's home without notice, which was difficult. (Ex. N, pp. 56-57) Claimant reported feeling isolated, reported having low energy, and he estimated he was sleeping two to three hours at a time because his foot pain woke him up. (Ex. N, p. 57) Claimant reported having some cognitive issues, but stated the issues did not interfere with his daily functioning. (Ex. N, p. 58) Claimant denied having anxiety, but reported he worried about his finances and his daughter. (Ex. N, p. 58)

Dr. Jennisch diagnosed claimant with an adjustment disorder but opined his mental health condition was not caused by the August 2018 work injury. (Ex. N, p. 62) In support of his conclusion, Dr. Jennisch noted claimant denied having psychiatric symptoms until he experienced a job loss and the additional stress from his daughter's health condition, consistent with his deposition testimony prior to his termination. (Ex. N, p. 62) Dr. Jennisch opined:

Undoubtedly, chronic pain does not help the situation but there has not been a significant change in his overall medical condition, and he was by his own account and by review of the medical record coping with these issues well until he lost his job, his daughter's health declined further, and she abruptly moved out. His doctors' notes support that interpretation in November 2020. Rather, the stress of job loss and concern for his daughter likely increased his perception of pain. It is also certainly possible that his health declined in ways that he is experiencing more pain; however, I do not believe that this is a causal or significant aggravating factor in the Adjustment Disorder.

(Ex. N, p. 64)

Dr. Jennisch found medication could be used to treat claimant's adjustment disorder, recommended no restrictions, and found claimant's condition is not severe and disabling, noting claimant effectively runs a household for two people and can take care of his daughter's significant health conditions while taking care of his own. (Ex. N, p. 65) Dr. Woods reviewed Dr. Jennisch's opinion and submitted a response standing by his original findings and disagreeing with Dr. Jennisch's findings.

Dr. Dinoff examined claimant and issued her report on May 17, 2021. (Ex. 10) Dr. Dinoff noted claimant had a prior history of an anxiety disorder and impulse control disorder dating back to July 27, 2016. (Ex. 10, p. 2) Dr. Dinoff found claimant gave full effort to the evaluation and the results are believed to accurately reflect claimant's current psychological functioning. (Ex. 10, p. 5) Dr. Dinoff diagnosed claimant with depression, severe, recurrent, without psychosis, anxiety, history of trauma, chronic pain, and tobacco use. (Ex. 10, p. 7). Dr. Dinoff found:

Mr. Turner's pains are likely complicated by his depression, anxiety, and history of childhood trauma. He also has a history of trauma from his injury. In addition, patient experiences significant insomnia (sleep onset and maintenance) due to his pain which is making it difficult for him to cope. During the appointment, I reached out to Drs. Wikle and Kral who are working with patient's insurance to fill hydrocodone prescription. I have provided Mr. Turner with GoodRX information. Mr. Turner would like to schedule return pain psychology appointment and order has been written.

(Ex. 10, p. 7)

On de novo review I find claimant has established he sustained a sequela adjustment disorder caused by the August 2018 work injury.

Just over a month after the work injury claimant was referred to Dr. Tallman, a psychologist. (JE 2, p. 37) Dr. Tallman listed a referral diagnosis of adjustment disorder with anxiety and depressed mood. (JE 2, p. 37) Dr. Tallman noted claimant's "mood appears to be predominantly stable with some mild mood fluctuations, including anxiety," his current coping was appropriate, and Dr. Tallman recommended follow-up on inpatient rehabilitation for monitoring and support as needed. (JE 2, p. 37) Claimant's medical records do not document any additional monitoring by Dr. Tallman or any other mental health provider.

As a result of the work injury claimant developed chronic pain in his feet. It was not until defendant-employer terminated claimant's employment that he reported any mental health symptoms, during an appointment with Dr. Karam on November 3, 2020. (JE 2, p. 74) Dr. Karam documented claimant reported he had recently been released from work and he was "quite down and demoralized" and his significant discomfort "is affecting the quality of his life." (JE 2, p. 74) Dr. Karam observed claimant appeared "pretty down given the situations in his life," but noted he had "typically demonstrated good coping mechanisms in the past. (JE 2, p. 75)

Dr. Karam referred claimant to Dr Wikle for pain management. During his first visit with Dr. Wikle on November 18, 2020, Dr. Wikle prescribed Cymbalta "[f]or his chronic pain with associated depression," and advised claimant to see a clinical pain psychologist "for the psychosocial aspect of pain care through coping skills, relaxation strategies, cognitive group therapy etc." (JE 2, p. 86) During a follow-up visit on

January 19, 2021, Dr. Wikle noted he had discussed pain psychology with claimant "given the fact that he has significant emotional distress related to his injury" and stated he would like to have claimant evaluated, noting "it seems that his pain is significantly limiting his function." (JE 2, p. 96) Dr. Wikle again recommended Cymbalta "[f]or his chronic pain with associated depression." (JE 2, p. 97)

In responding to a check-the-box letter from defendants' counsel, Dr Wikle agreed, without providing any comments to the statement, "[y]our referral to a pain psychologist was not intended to opine that Mr. Turner actually has a psychiatric disorder or that same is connected to the work injury," and Dr. Wikle agreed he commonly refers patients to pain psychologists in his practice, and he agreed the referral to a pain psychologist was for a session or two to teach claimant techniques for coping with pain. (Ex. K, pp. 45-46) Dr. Wikle is not a psychiatrist. His medical records document he observed claimant was experiencing emotional distress related to his work injury, his pain was significantly limiting his function, and he recommended Cymbalta for claimant's chronic pain associated with depression.

Both Dr. Woods and Dr. Jennisch diagnosed claimant with an adjustment disorder. This was the same referral diagnosis noted by Dr. Tallman in September 2018. There is no documentation claimant was diagnosed with or treated for an adjustment disorder before the work injury.

Dr. Woods opined claimant's adjustment disorder was caused by the work injury. Dr. Jennisch disagreed, finding it was caused by his termination and stress related to his daughter's medical issues and departure from his home. Contrary to the deputy commissioner, I find Dr. Woods' opinion on causation more persuasive than Dr. Jennisch's opinion.

In reaching his conclusion, Dr. Jennisch noted, "[u]ndoubtedly, chronic pain does not help the situation but there has not been a significant change in his overall medical condition, and he was by his own account and by review of the medical record coping with these issues well until he lost his job, his daughter's health declined further, and she abruptly moved out." Dr. Jennisch did not elaborate on or explain his finding that "chronic pain does not help the situation."

Dr. Dinoff diagnosed claimant with depression, severe, recurrent, without psychosis, anxiety, history of trauma, chronic pain, and tobacco use. (Ex. 10, p. 7). Dr. Dinoff noted claimant's pain is complicated by his depression, anxiety, history of childhood trauma, trauma from this injury, and significant insomnia due to his pain, which makes it difficult for him to cope. (Ex. 10, p. 7) While Dr. Dinoff did not diagnose claimant with an adjustment disorder, she noted claimant has problems with depression and anxiety also noted by Dr. Woods. I find claimant has met his burden of proof to establish he sustained a sequela mental health condition caused by the August 2018 work injury.

In addressing permanency, Dr. Woods found if claimant's chronic pain is not resolved his adjustment disorder "will be permanent." (Ex. 2, p. 32) Dr. Woods has not opined claimant's adjustment disorder with mixed anxiety and depressed mood is permanent. No physician or psychologist has opined claimant's mental health condition is permanent. While I find claimant has met his burden to prove he sustained a sequela mental health condition, I find he has not proven the condition is permanent.

In the first page of his appeal brief, claimant noted, "[o]n intra-agency appeal, Turner appeals the determination of the deputy that Turner failed to establish he suffers from a mental health condition as a result of his chronic pain and asks the Commissioner to assess the extent of his disability resulting from such." Claimant did not appeal the industrial disability determination with respect to his physical conditions. Because claimant has not established his mental condition is permanent, no additional industrial disability benefits should be awarded at this time.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on February 24, 2022, is affirmed in part, and is reversed in part.

Defendants shall pay claimant 200 weeks of permanent partial disability benefits at the weekly rate of six hundred fifty and 86/100 (\$650.86), commencing on July 8, 2019.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants shall provide claimant with future medical care for all treatment causally related to the August 1, 2018, work injury.

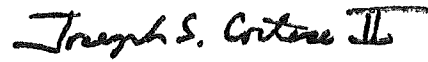
Defendant shall pay claimant three thousand eight hundred and 00/100 dollars (\$3,800.00) in penalty benefits.

Defendants shall reimburse claimant in the amount of three thousand nine hundred eighty-seven and 50/100 dollars (\$3,987.50) for the cost of Dr. Taylor's IME.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant one hundred twenty-seven and 72/100 dollars (\$127.72) for the cost of the filing and service fees, one hundred sixty-nine and 95/100 dollars (\$169.95) for the cost of deposition transcripts, and ninety-five and 00/100 dollars (\$95.00) for the cost of the January 7, 2021, letter from Dr. Taylor, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 30th day of September, 2022.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Thomas Wertz (via WCES)

Stephen Spencer (via WCES)

Christopher Spencer (via WCES)