BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GREGORY WALKER, JR., Claimant, vs. IOWA COUNTERTOPS, INC., Employer, and SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 5066334 A R B I T R A T I O N D E C I S I O N Head Notes: 1402.30, 1802, 1803, 2501, 3230, 2907

STATEMENT OF THE CASE

Claimant, Gregory Walker, filed a petition in arbitration seeking workers' compensation benefits from Iowa Countertops, Inc., employer and Selective Insurance Company of South Carolina (Selective), insurer, and the Second Injury Fund of Iowa (Fund) all as defendants. This matter was heard on November 21, 2019 with a final submission date of December 16, 2019.

The record in this case consists of Joint Exhibits 1-9, Claimant's Exhibits 1-11, Defendants Iowa Countertops and Selective, Exhibits' A through K, Defendant Fund's Exhibits AA through BB, and the testimony of claimant, Robert Backstrom, and Connie Oppedal, M.S.

Defendants Iowa Countertops and Selective attached Addendum I and II to their brief. These addendums were not in exhibits submitted at hearing. As a result, Addendums and I and II will not be considered in determining the issues in this case.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. Whether claimant sustained a mental injury that arose out of and in the course of employment.
2. The extent of claimant's entitlement to permanent partial disability benefits.
3. Rate.
4. The extent of claimant's entitlement to temporary benefits.
5. Whether there is a causal connection between the injury and the claimed medical expenses.
6. Whether claimant is entitled to alternate medical care.
7. Whether claimant qualifies for Fund benefits; and if so
8. The extent of claimant's entitlement to Fund benefits.
9. Whether defendant employer and insurer are liable for penalty under Iowa Code section 86.13.
10. Costs.

The parties did stipulate in the hearing report claimant sustained an injury that arose out of and in the course of employment. However, it is clear from the arguments at hearing and the parties' post-hearing briefs it is disputed whether claimant sustained a mental injury that arose out of and in the course of employment.

FINDINGS OF FACT

Claimant was 28 years old at the time of hearing. Claimant graduated from high school. Claimant attended Northern Illinois College for one year and played football there. Claimant attended DuPage College. Claimant attended Iowa State University (ISU) from 2012 through 2014. Claimant studied mechanical engineering and played football at ISU. Claimant testified he stopped playing football, as he could not focus enough on classes while playing football. Claimant dropped out of ISU for financial reasons. Claimant testified he plans to return to ISU in the spring of 2020 to study business management. (Transcript pages 14, 20, 55-57)

Claimant has worked as a counselor in the summer for the Chicago Park District. Claimant worked for Woodward Academy, in Woodward, Iowa as a counselor. Claimant also worked at UPS, FedEx, and Safelite as a seasonal worker. (Exhibit G, p. 39)

Claimant was hired by Iowa Countertops on July 5, 2017. Claimant was a warehouse worker/machine operator. At the time of injury, claimant was training to be a CNC Operator. A CNC machine is a computerized machine that cuts stone.

Claimant's prior medical history is relevant. Claimant had an injury to his left knee while playing football. (Tr. pp. 38-39) Claimant was assessed as having a left lateral meniscus tear. On July 29, 2008 claimant underwent a left lateral meniscectomy. (Ex. J1)

Claimant testified he had problems after surgery. He says he wears a left knee brace when playing football or working out. (Tr. p. 72; Ex. A; Deposition pp. 47-48; Ex. AA, p. 5) Claimant says he continued to lift weights, box and compete in MMA until his injury in 2017. (Tr. pp. 73-74)

On July 31, 2017 claimant twisted his ankle while lifting with a coworker.

On August 1, 2017 claimant was evaluated by Ellie Bishop, D.O. Claimant was unable to bear weight on the right. Claimant was advised to rest, ice, and elevate his right ankle. (Joint Exhibit 3, pp. 7-10)

Claimant was eventually referred to a podiatrist. Claimant saw R.D. Lee Evans, DPM on September 13, 2017 for ankle pain lasting two months. X-ray showed no obvious sign of a fracture. An MRI was recommended. (Jt. Ex. 5, pp. 21-22)

An MRI performed on October 20, 2017 showed an osteochondral lesion affecting the middle third of the lateral talar dome. (Jt. Ex. 5, p. 25)

On November 6, 2017 claimant was evaluated by Jon Gehrke, M.D. Claimant was assessed as having an osteochondral injury on the right ankle. Surgery was discussed and chosen as a treatment option. (Jt. Ex. 5, pp. 27-28)

Robert Backstrom testified he is the vice president and co-owner of Iowa Countertops. In that capacity he is familiar with claimant, claimant's job and claimant's injury. He said claimant's work with Iowa Countertops ended in December of 2017, as the company did not have any more light duty for claimant. Claimant was terminated from Iowa Countertops in April of 2018 due to a slow down of the business. (Tr. pp. 115-119) Claimant testified in deposition his last day at work for Iowa Countertops was December 8, 2017. (Ex. A; Depo. p. 24)

On February 6, 2018 claimant underwent surgery with Dr. Gehrke consisting of a right ankle arthrotomy with debridement of the lateral talar dome and a Brostrom-Gould repair of the lateral ankle ligamentous complex. (Jt. Ex. 7, pp. 56-57)

Claimant followed up with Dr. Gehrke's office from February of 2018 through April of 2018. On March 9, 2018 claimant was still wearing a CAM boot. Claimant was to be in physical therapy and kept off work. (Jt. Ex. 5, pp. 30-34)

Claimant began with physical therapy on April 11, 2018. (Jt. Ex. 8, p. 58) On April 24, 2018 physical therapy notes indicate claimant had an 80 percent improvement. Claimant was working out and riding a bike. (Jt. Ex. 8, p. 68) On April 26, 2018 notes

indicate claimant had 90 percent improvement. Claimant was working out at the gym and had squatted 250 pounds. (Jt. Ex. 8, p. 70)

Claimant returned in follow up with Dr. Gehrke. Claimant had a little discomfort in the ankle. Claimant was released without restrictions on May 14, 2018. (Jt. Ex. 5, pp. 35-37)

Claimant returned to Dr. Gehrke on June 27, 2018 with ongoing discomfort. Claimant's ankle was more stable following surgery. Dr. Gehrke recommended further physical therapy. Claimant was restricted to sit-down work only. (Jt. Ex. 5, p. 40)

On June 23, 2018 claimant returned to physical therapy due to worsening symptoms. (Jt. Ex. 8, p. 74)

On August 13, 2018 claimant indicated a 70 percent improvement with symptoms following physical therapy. (Jt. Ex. 8, p. 86)

On August 15, 2018 claimant returned to Dr. Gehrke. Claimant had ongoing problems with ankles. Claimant was continued with physical therapy and restricted to sit-down work only. (Jt. Ex. 5, pp. 41-43)

On November 7, 2018 Dr. Gehrke again saw claimant. Claimant was doing work hardening. Claimant did not want injections for pain. Claimant was continued on prior restrictions. (Jt. Ex. 5, p. 47)

On November 28, 2018 claimant's son was born. (Ex. A; Depo. p. 32)

Claimant returned to Dr. Gehrke on December 19, 2018. Claimant still had discomfort in the ankle when he was on his feet for an extended period of time. Claimant was unable to attend some work hardening due to the arrival of his son. Claimant was continued on sit-down work only and work hardening. (Jt. Ex. 5, p. 48)

Physical therapy records from January 24, 2019 indicate claimant was unable to attend physical therapy until that date due to his new son's medical condition. (Jt. Ex. 8, p. 125)

Claimant testified his girlfriend was in the hospital for approximately a month and a half after the birth of their son with medical complications. Claimant testified she had to return to the hospital for a month and a half in February or March of 2019. (Tr. pp. 63-64; Ex. 2, p. 25)

On February 8, 2019 claimant returned to Dr. Gehrke. Claimant was found to be at maximum medical improvement (MMI) with restrictions of sit-down work when needed. Claimant was instructed to complete work hardening. (Jt. Ex. 5, pp. 50-51)

A February 20, 2019 physical therapy note indicated claimant was at 80 percent of his prior injury status. Claimant was working out with a trainer. Claimant's current

ability was he was able to perform heavy to very heavy work. Claimant was able to lift up to 100 pounds, carry 125 pounds and pull over 260 pounds. (Jt. Ex. 9, pp. 133-134)

In a letter dated February 29, 2019 claimant was notified his temporary benefits would end. Claimant would be paid seven weeks of permanent partial disability benefits from February 26, 2019 through March 26, 2019. (Ex. E, p. 32)

A February 27, 2019 physical therapy note indicates claimant was practicing for his firefighter physical ability test and had done so the prior day. (Jt. Ex. 9, p. 137)

In a March 31, 2019 note Dr. Gehrke diagnosed claimant as having right ankle arthritis and recommended further work hardening. He stated claimant had reached MMI on February 28, 2019. He found claimant had a 7 percent permanent impairment to the foot, converting to a 5 percent permanent impairment to the leg based on Tables 17-31 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Jt. Ex. 5, p. 52)

On April 12, 2019 or April 13, 2019 claimant took the firefighter physical ability test. Claimant testified he did not pass the test. Claimant said he has not taken the test again, as there have not been any openings. (Tr. pp. 67-68; Jt. Ex. 9, p. 153)

In a letter dated April 19, 2019, defendant insurer seems to indicate they had overpaid claimant temporary benefits. The letter states:

> Please be advised that ongoing TTD continued beyond 03/26/19, and this letter serves as a new Auxier letter. TTD will end on 05/19/19 since we inadvertently continued to pay and will be applied towards PPD. We also appreciate you informing your client, Mr. Walker of same.

(Ex. E, p. 33)

In May or June of 2019 claimant began working part-time for UPS. Claimant worked for approximately three weeks. Claimant quit the job, as he was unable to continually stand while working. (Ex. 2, pp. 21-22)

On May 30, 2019 claimant was seen by Scott Fackrell, D.O. for a physical. Claimant was assessed as having a well-adult exam. Claimant was also assessed as having depression with anxiety. Claimant was prescribed mirtazapine. (Ex. 4, pp. 11, 18)

In an October 1, 2019 report, Philip Ascheman, Ph.D., gave his opinions of claimant's mental health following an independent psychological evaluation. A review of mental health records indicate claimant had been prescribed an antidepressant on December 13, 2016. Records indicate claimant was prescribed an anti-depressant, escitalopram, on August 2, 2017, but started on a different anti-depressant, mirtazapine. Mirtazapine was discontinued on March 26, 2019. (Ex. B, p. 3) Claimant was

evaluated on May 30, 2019 and was found to have depression with anxiety. Claimant was again prescribed mirtazapine. (Ex. B, pp. 3-4)

Claimant indicated to Dr. Ascheman that around September of 2017 claimant began having difficulty with sleep, decreased appetite and was worried about finances and losing his job. Claimant indicated that at the time of the evaluation claimant still had stress with his financial situation. Claimant believed if he could find work, stress would decrease. Claimant was still taking an antidepressant at the time of the evaluation. (Ex. B, pp. 5-6)

Dr. Ascheman assessed claimant as having an adjustment disorder with mixed anxiety and depressed mood. Dr. Ascheman believed this was a preexisting condition beginning in December of 2016. He opined claimant's preexisting adjustment disorder was exacerbated by the work injury. Dr. Ascheman did not believe claimant had sustained a substantial psychological injury caused by the July of 2017 work injury. (Ex. B, p. 7)

Dr. Ascheman did not believe claimant required any further medical health treatment. He found claimant had no permanent psychological impairment. (Ex. B, p. 8)

In an October 9, 2019 report, Sunil Bansal, M.D. gave his opinion of claimant's condition following an IME. Claimant still had pain in the top of his right foot. Claimant had difficulty with standing or walking more than one hour. Dr. Bansal agreed with Dr. Gehrke regarding claimant's MMI date. Dr. Bansal found claimant had a 9 percent permanent impairment to the left upper extremity. He agreed with Dr. Gehrke's restrictions regarding claimant's right upper extremity. (Ex. 1, pp. 1-10)

Dr. Bansal also assessed claimant as having a left lateral meniscus tear. He found claimant had a 2 percent permanent impairment to the left lower extremity. (Ex. 1, p. 10)

In an October 14, 2019 report, William Boulden, M.D. gave his opinion of claimant's condition following an IME. Dr. Boulden agreed with Dr. Gehrke that claimant had a 5 percent permanent impairment to the right lower extremity. He did not believe claimant required any permanent restrictions. This was because claimant continued to be active with conditioning and working out. (Ex. C)

In an October 22, 2019 report, Kunal Patra, M.D. gave his opinions of claimant's mental health condition following an independent psychological evaluation. Claimant indicated he began to feel depression and anxiety in September of 2017 when his pay was decreased at Iowa Countertops and he had difficulty paying his bills. (Ex. 2, p. 23) Claimant said in September of 2017 his family doctor prescribed him mirtazapine. He said the medication helped with sleep, but he still felt he struggled with depression. (Ex. 2, p. 24) Claimant said he had no anxiety or depression prior to September of 2017. (Ex. 2, p. 24)

Claimant believed his depression and anxiety was due to his loss of income, his difficulty with supporting himself and his family, and his difficulty with paying bills. He also has depression and anxiety due to his girlfriend developing an infection following cesarean operation, and being in the hospital for an extended period of time. Claimant also said he felt depression and anxiety for having to be the sole caretaker for a new child. (Ex. 2, pp. 34-35)

Claimant indicated that in 2016 he had discussed test taking anxiety with a family doctor and was prescribed medication. He said he did not take the medication. Claimant said he was given a prescription for depression medication on October 2, 2017 but did not start taking the medication until the later part of 2017. Claimant said he wanted to return to work or school, as it would give him purpose. (Ex. 2, pp. 25-26)

Dr. Patra assessed claimant as having a major depressive disorder, single episode with moderate intensity. He also assessed claimant with having generalized anxiety disorder. Dr. Patra found the workplace injury caused claimant's major depressive disorder. He also opined claimant's heavy alcohol intake, girlfriend's health issues in 2018 and 2019, and claimant lacking social support contributed to his depression. (Ex. 2, pp. 29-31)

Dr. Patra did not believe claimant's current mental issue preexisted his work injury. This was because records indicate claimant did not receive medication for depression and anxiety until May 30, 2019. He opined claimant's work injury was a significant causal factor in bringing about or worsening claimant's mental health issues. (Ex. 2, p. 32)

Dr. Patra indicated claimant's depression and anxiety should be receptive to treatment, and should be only temporary in nature. (Ex. 2, p. 35)

In an October 21, 2019 report Carma Mitchell, MS, CRC, gave her opinions of claimant's vocational opportunities. She opined claimant was not able to return to any of his prior work and she believed claimant had a 76.6 percent loss of access to the labor market. (Ex. 3)

In an October 25, 2019 report, Connie Oppedal, M.S., gave her opinions of claimant's vocational opportunities. Ms. Oppedal disagreed with Ms. Mitchell's evaluation of claimant's vocational opportunities, as Ms. Mitchell did not indicate what method she used to drive claimant's loss of access to the labor market. She also disagreed with Ms. Mitchell's evaluation of claimant, as claimant had no lifting restrictions. Claimant was also not limited to sitting at all times, and claimant had no permanent restrictions regarding his left knee. She opined claimant could potentially find employment in approximately ten different jobs. (Ex. D)

The records indicate claimant was prescribed mirtazapine for depression on August 2, 2017. (Jt. Ex. 2, p. 4) Claimant said he stopped taking the medication in November of 2017, as he did not like taking medication and it gave him suicidal

thoughts. Claimant said he began retaking the medication in May of 2019. (Jt. Ex. 2, pp. 4-5; Jt. Ex. 4, pp. 15-19; Tr. pp. 52-53)

Claimant testified he has continued pain on the right side of his right foot. He said his ankle will lock up if he sits down too long. He said standing for long periods of time will aggravate his ankle. He says he can stand for no more than 45 minutes to an hour given his limitations. Claimant says he still works out in a gym.

Claimant said he would have difficulty returning to any of his prior jobs, as they all required a lot of standing and walking.

Mr. Backstrom testified that given claimant's restrictions by Dr. Gehrke, he probably could not rehire claimant to work at Iowa Countertops. (Tr. pp. 119-120)

Claimant has applied for work since leaving Iowa Countertops. (Ex. 8; Ex. 9) Claimant applied for 12 jobs between May and August of 2018. He applied for 12 more jobs between April 2019 and September of 2019.

Claimant was paid $14.00 an hour for the time he worked at Iowa Countertops. He testified he was expected to work between 35-40 hours a week. (Ex. 7, p. 63; Ex. F, pp. 36-37; Tr. p. 17)

Mr. Backstrom testified that the last full CNC operator was an employee named Cody. He said Cody left in September of 2016. He testified full-time employees at Iowa Countertops typically worked 35 hours a week. He testified that the two-week period claimant worked more than 80 hours was not reflective, as a lot of the time was used for training claimant. (Tr. pp. 114-116)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained a mental injury that arose out of and in the course of employment.

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a

period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

As detailed, the parties agree claimant sustained an injury to his right ankle that arose out of and in the course of employment. The parties disagree whether claimant sustained a mental injury that arose out of and in the course of employment.

Two experts have opined regarding the causal connection between claimant's mental health condition and the July 31, 2017 work injury.

Dr. Ascheman saw claimant once for an independent psychological evaluation. Dr. Ascheman opined claimant had a preexisting adjustment disorder that was only modestly exacerbated by events following the work injury. (Ex. B, p. 7) The problem with Dr. Ascheman's opinion is that except for records showing claimant was prescribed an antidepressant before his work injury, there is no record claimant had a preexisting adjustment disorder. For this reason, I find Dr. Ascheman's opinion regarding the preexisting adjustment disorder not convincing.

Dr. Patra opined claimant had a major depressive disorder, and claimant's injury materially brought on claimant's depression and anxiety. (Ex. 2, p. 32)

I also have some concerns regarding Dr. Patra's opinions. Claimant was injured on July 31, 2017. It was not until approximately two years after the date of injury that

depression is even mentioned in the treating records. Even then, it is not causally connected to the work injury. (Jt. Ex. 4, p. 18) It is not until Dr. Patra's evaluation, on September 13, 2019, that claimant's depression is linked to his work injury. Dr. Patra offers no rationale for this two-year lapse in time between the date of injury and the eventual link between the injury and claimant's depression.

Second, as detailed in the record, claimant received a prescription for an antidepressant on October 9, 2017. After October 9, 2017, claimant did not get another prescription for an antidepressant until May 30, 2019. (Jt. Ex. 2, pp. 4-5) Between November of 2018 and May 2019, claimant had life stressors that included a son being born, claimant's girlfriend being hospitalized for a month and a half, claimant's son having medical health issues, claimant being the sole caregiver for a new infant, and claimant's workers' compensation benefits being terminated. (Jt. Ex. 4, p. 16; Ex. B, p. 4; Ex. E, p. 33; Ex. 2, p. 25) The temporal relationship with claimant taking antidepressants in late May 2019, seems more tied to these stressors in claimant's life than does his work injury.

Given these issues, it is also found Dr. Patra's opinion regarding the causal connection between claimant's mental health injury and his work injury are found not convincing.

For two years following the date of injury, not one physician assessed claimant as having depression and anxiety. Between October of 2017 and May of 2019 claimant did not have prescription medications for mental health. Claimant did not begin taking prescriptions for mental health conditions until after he had major life stressors not associated with the actual injury. The opinions of Dr. Patra regarding causation of claimant's mental health condition are found not convincing. Given this record, claimant has failed to carry his burden of proof he had a work-related mental health condition.

Since it is found claimant has failed to carry his burden of proof he sustained a mental health injury, the issue of claimant's entitlement to alternate medical care for the mental injury is moot.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits from defendant employer and insurer.

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

scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Three experts have opined regarding the functional impairment to claimant's right ankle. Dr. Gehrke treated claimant for an extended period of time and performed surgery on claimant. Dr. Gehrke opined claimant had a 5 percent permanent impairment to the lower extremity based upon Table 31 of the Guides. (Jt. Ex. 5, p. 52) This is based upon a finding that claimant had a 3 mm. cartilage interval. There is no reference in the record to this figure, and it is unclear where Dr. Gehrke obtained this 3 mm. measurement for a cartilage interval. Dr. Boulden agreed with Dr. Gehrke's rating, but gives no rationale for that agreement. (Ex. C, p. 21)

Dr. Bansal found claimant had a 9 percent permanent impairment to the lower extremity. (Ex. 1) This is based upon measurements of claimant's plantar flexion, dorsal flexion, inversion and eversion. These figures are used in arriving at a figure of impairment using Table 17-11 and 17-12. I am able to understand Dr. Bansal's findings for claimant's permanent impairment. I do not know how Dr. Gehrke arrived at his measurements for the cartilage interval. Based on this, it is found claimant has a 9 percent permanent impairment to the lower extremity. Claimant is due 19.8 weeks of permanent partial disability benefits for the right ankle injury (9% x 220 weeks).

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Under section 85.36(7), the gross weekly earnings of an employee who has worked for the employer for less than the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings of other similarly situated employees employed over that full period, but if earnings of similar employees cannot be determined, by averaging the employee's weekly earnings computed for the number of weeks that the employee has been in the employ of the employer.

The record indicates claimant was paid $14.00 an hour working at Iowa Countertops. (Ex. 7, p. 63; Ex. F, pp. 36-37) Claimant testified he was expected to work between 35-40 hours per week. (Tr. p. 17) Mr. Backstrom testified the last full-time CNC operator was a worker named Cody. He said Cody worked until September of 2016. Mr. Backstrom testified that employees with Iowa Countertops typically worked 35 hours per week. (Tr. p. 115)

The four weeks before claimant's injury, claimant worked an average of 33.71 hours per week. (Ex. 5) Claimant contends the weeks ending on July 8, 2017 and July 15, 2017 are unrepresentative of the time claimant worked. Claimant argues only the weeks ending on July 22, 2017 and July 29, 2017 should be used, resulting in an average weekly hours worked of 41.16 hours per week. (Ex. 5; Claimant's post-hearing brief, p. 21)

Mr. Backstrom testified 80 plus hours over a two-week period was not reflective of what claimant's average work week would be. This was because during that time claimant was being shown how to operate the CNC machine, and because claimant was undergoing training, those hours worked would be higher than normal. (Tr. pp. 115-116)

Defendants suggest one way to compute the average weekly hours claimant worked is under Iowa Code section 85.36(7) by comparing claimant's hours worked with a similarly rated employee (Cody). I do not believe Iowa Code section 85.36(7) is the right method, as the similarly situated employee must be in the employment of ". . . the employer the full 13 calendar weeks immediately preceding the injury. . ." The former employee, Cody, left Iowa Countertops in September of 2016. Claimant was injured in July of 2017. Based on this, I do not think I can only rely on Iowa Code section 85.36(7) to determine claimant's average weekly hours. However, I do believe the average hours worked by the coworker, Cody, can be used to help determine rate.

Review of the hours worked by the similarly situated worker "Cody" indicate from August 15, 2015 through June 18, 2016, he worked an average of 36.23 hours per week. (Ex. K, pp. 50-54) Claimant testified he worked between 35-40 hours a week. Mr. Backstrom testified an average employee with Iowa Countertops worked 35 hours per week. Based upon this, it is found claimant's average hours worked per week is 36.23 hours per week. Claimant's average weekly wage is found to be $507.22 per week (36.23 x $14.00). Claimant was single with one exemption. Claimant's rate is $320.46 per week.

The next issue to be determined is the extent of claimant's entitlement to healing period benefits.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor

an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

On December 8, 2017 the employer stopped offering claimant light duty. (Ex. A; Depo. p. 24) On May 11, 2018 Dr. Gehrke found claimant could return to work without restrictions. (Jt. Ex. 5, pp. 35-37) On June 27, 2018 Dr. Gehrke returned claimant to work to sit-down work only. (Ex. 5, p. 40) The record indicates the employer could not accommodate claimant's work within these restrictions. On February 8, 2018 Dr. Gehrke found claimant was at MMI. (Jt. Ex. 5, p. 50) Given this record, claimant is due healing period benefits from December 9, 2017 through May 11, 2018, and from June 27, 2018 through February 8, 2019. The parties stipulate in the hearing report that claimant's permanent partial disability benefits should begin as of February 9, 2019.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

As noted, claimant failed to carry his burden of proof his work injury resulted in a mental injury. For this reason, defendant employer and insurer are only liable for the medical expenses related to claimant's ankle injury and are not liable for expenses related to claimant's mental health injury.

The next issue to be determined is whether claimant is entitled to Fund benefits.

Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, Section 17:1, p. 211 (2014-2015).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

Dr. Bansal found claimant had a 2 percent permanent impairment to his left lower extremity. (Ex. 1, p. 10) There is no expert opinion contrary to Dr. Bansal's opinion. Dr. Bansal suggested permanent restrictions regarding the left knee. There is no indication, other than Dr. Bansal's IME, that claimant required any permanent restrictions regarding his left knee. Claimant credibly testified he wears a left knee brace. Given this record, it is found claimant has a qualifying first injury for the purposes of Fund benefits.

As detailed above, it is found claimant has a 9 percent permanent impairment to his right lower extremity. Given this record, claimant has carried his burden of proof he has qualifying first and second injuries for the purposes of Fund benefits.

The next issue to be determined is the extent of claimant's entitlement to Fund benefits.

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant was 28 years old at the time of hearing. Claimant graduated from high school. Claimant has attended college at Northern Illinois, DuPage College and ISU. Claimant has not graduated from college. Claimant has worked as a counselor for the Chicago Park District. He worked as a counselor for Woodward Academy. Claimant has also worked part time at UPS, FedEx and Safelite as a seasonal worker.

As noted above, claimant has a 2 percent permanent impairment to the left knee and 9 percent permanent impairment to the right lower extremity. Claimant testified he can stand between 45 minutes to an hour but he sits when needed. Claimant does have permanent restrictions from Dr. Gehrke that allow him to sit as needed. The record indicates as of April 2018 claimant reported a 90 percent improvement and was squatting 250 pounds. (Jt. Ex. 9, p. 153) In short, claimant does have restrictions regarding being allowed to sit when necessary. He has no permanent restrictions regarding lifting. As indicated, claimant is a physical person and can still lift a substantial amount of weight.

Two vocational experts have opined regarding claimant's job opportunities. Ms. Mitchell opined claimant has over a 76 percent loss of access to the labor market. (Ex. 3, p. 4) I have a great deal of respect for Ms. Mitchell's opinions. However, she does not provide any analysis or findings on how she arrived at this figure for loss of access to the labor market.

Ms. Oppedal also opined there were several positions claimant could apply for. However, Ms. Oppedal only identifies nine occupations claimant can perform. (Ex. D, p. 29; Tr. pp. 126-127) Claimant has actually applied for some of these jobs Ms. Oppedal identified and has not been hired for work.

While both of the vocational reports are helpful in evaluating claimant, neither report is convincing regarding claimant's economic loss.

Claimant has applied for 24 jobs in over an 18-month period. (Ex. 9) Between May and August of 2018 he applied for 12 jobs. Between April and September of 2019 he applied for another 12 jobs. Exhibit 9 indicates claimant has applied for work since leaving Iowa Countertops. However, Exhibit 9 also suggests claimant's job search has been less than dynamic. When all factors are considered, it is found claimant has a 20 percent loss of earning capacity or industrial disability. This entitles claimant to 75.8 weeks of Fund benefits after considering the Fund's credit [100 weeks – 4.4 weeks (2% x 220 weeks) + 19.8 weeks (9% x 220 weeks)]. The Fund shall receive a credit of 24.2 weeks (4.4 weeks + 19.8 weeks).

The next issue to be determined is whether defendant employer and insurer are liable for penalty benefits.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to

contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Claimant contends defendants are liable for penalty for the late payment of benefits.

Weekly compensation benefits are due at the end of the compensation week. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996). Benefits are due weekly under Iowa Code section 85.30.

Exhibit E indicates defendants made approximately eight payments that were delayed between one to three weeks. These are payments, as shown at Exhibit E, that were issued on February 28, 2018, March 26, 2018, May 15, 2018, July 13, 2018, August 2, 2018, September 13, 2018, December 12, 2018, and January 18, 2019. The record suggests one payment, issued on October 16, 2018, was made approximately

11 weeks late. It also appears payments, that should have had a start date of October 31, 2018, were never issued. The total of late payments is approximately $5,544.47.

On August 31, 2018, September 10, 2018, December 11, 2018, December 14, 2018, January 7, 2019, January 14, 2019, and January 17, 2019, claimant's counsel requested these delayed payment of benefits. Claimant testified he called the insurer and his employer, but got no response regarding why payments were consistently late. (Tr. pp. 95-96)

Defendants offered a few rationale why they should not be penalized for these late payments. None of these arguments are reasonable or persuasive.

Defendants delayed approximately $5,500.00 worth of benefits to claimant. A 50 percent penalty is appropriate. Defendants are liable for a penalty of $2,750.00 ($5,500.00 x 50%).

The final issue to be determined is costs.

The Second Injury Fund Act does not provide for costs to be paid from the Fund, and Iowa Code section 85.66 expressly prohibits expenditures from the Fund for other purposes. Subsection 2 of Iowa Code section 85.66, which codifies the creation of the Fund, specifically states, in pertinent part ". . . Moneys collected in the second injury fund shall be disbursed only for the purposes stated in this subchapter, and shall not at any time be appropriated or diverted to any other use or purpose." The plain language of Iowa Code section 85.66 does not allow for the assessment of costs against the Fund. Houseman v. Second Injury Fund, File No. 5052139 (Arb. Dec. Aug. 8, 2016); see also DART v. Young, 867 N.W.2d 839, at 845 (Iowa 2015) (declaring an agency's authority to tax costs cannot go beyond the scope of the powers delegated in the governing statute). See also Second Injury Fund v. Greenman, File No. 5003370 (App. October 19, 2004); Second Injury Fund of Iowa v. Greenman, No. 05-0855 (Iowa Court of Appeals, October 25, 2006), unpublished 725 N.W.2d 658 (table).

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33 provides: [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Based on 876 IAC 4.33(6), defendants are found liable for the costs of Dr. Patra's report. Ms. Mitchell is not a "practitioner" as defined by agency precedent. As a result, defendants are not liable for the costs of Ms. Mitchell's vocational report. Defendants Iowa Countertops and Selective Insurance are liable for all other costs.

ORDER

Therefore, it is ordered:

That defendant employer and insurer shall pay claimant healing period benefits from December 9, 2017 through May 11, 2018 and from June 27, 2018 through February 8, 2019 at the rate of three hundred twenty and 46/100 dollars ($320.46) per week.

That defendant employer and insurer shall pay claimant nineteen point eight (19.8) weeks of permanent partial disability benefits at the rate of three hundred twenty and 46/100 dollars ($320.46) per week commencing on February 9, 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.

That defendant employer and insurer shall receive a credit for benefits previously paid.

That defendant employer and insurer shall pay a penalty of two thousand seven hundred fifty and 00/100 dollars ($2,750.00) for delayed payment of benefits.

That defendant employer shall pay claimant's medical benefits as detailed above.

That defendant Second Injury Fund shall pay seventy-five point eight (75.8) weeks of benefits commencing nineteen point eight (19.8) weeks after February 9, 2019.

That defendant employer and insurer shall pay costs as detailed above.

That defendant employer and insurer shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 11th day of February, 2020.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Neal (via WCES)
Jeffrey Lanz (via WCES)
Meredith Cooney (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.