BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFF MCGINNIS,

Claimant,

vs.

BAKER MECHANICAL, INC. d/b/a THE BAKER GROUP,

Employer,

and

EMC PROPERTY AND CASUALTY,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 5056591

ARBITRATION

DECISION

Head Notes: 1108.50, 1402.40, 1803, 3202, 3203

STATEMENT OF THE CASE

Jeff McGinnis, claimant, filed a petition in arbitration seeking workers' compensation benefits from Baker Mechanical, Inc. d/b/a The Baker Group, employer and EMC Property and Casualty, insurance carrier and The Second Injury Fund of Iowa ("the Fund"), as defendants. Hearing was held on July 3, 2018 in Des Moines, Iowa.

Jeff McGinnis was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE5, claimant's exhibits 1-5, defendants, employer and insurance carrier exhibits A-F, and the Fund's exhibits AA-BB. Defendant employer and insurance carrier were given the opportunity to obtain post-hearing rebuttal evidence. This evidence is admitted into the record and contained in defendants' exhibits and labeled as exhibit A1, pp. 9.1-9.10.

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.

The parties submitted post-hearing briefs on September 14, 2018.

ISSUES

The parties submitted the following issues for resolution:

1. Whether the permanent disability claimant sustained as a result of the April 1, 2015 work injury is a scheduled member disability to his left leg or an unscheduled disability extending into the body as a whole.

2. Nature and extent of claimant's entitlement to permanent partial disability benefits.

3. Whether claimant is entitled to payment of past medical bills?

4. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Jeff McGinnis, alleges that he sustained a work-related injury to his left lower extremity on April 1, 2015. He contends that the injury extends into his body as a whole and therefore is entitled to industrial disability benefits from the defendant employer and insurance carrier. In the alternative, claimant alleges that he also sustained an injury to his right lower extremity on February 2, 2009. If the April 1, 2015 injury is found to be a scheduled member injury, then Mr. McGinnis alleges entitlement to benefits from the Second Injury Fund of Iowa (the "Fund").

The first issue that must be addressed in this case is whether the April 1, 2015 injury to the left lower extremity is contained to the scheduled member or if it "spilled over" into the body as a whole. At the time of the April 2015 injury, Mr. McGinnis was working for the defendant employer, Baker Mechanical Inc. d/b/a The Baker Group (hereinafter "Baker") performing HVAC service technician work. Ms. McGinnis was on a ladder when he fell ten to sixteen feet. He sustained an open left tibiofibular fracture. Mr. McGinnis underwent three surgical procedures in April of 2015. The procedures included placement of an external fixator and subsequent surgical irrigation and debridement with open reduction internal fixation (ORIF). He required repeat left tibiofibular surgery in January of 2016 with hardware removal, redo ORIF and bone grafting. In late 2016/early 2017 Mr. McGinnis developed multiple draining wounds from the left lower extremity. On May 25, 2017, Mr. McGinnis was admitted to the hospital and underwent irrigation and debridement of the left distal tibia and fibula with removal of deep hardware. (Joint Exhibit 5, page 1; testimony)

On May 26, 2017, he saw Roger Harvey, D.O. an infectious disease doctor. The doctor noted that Mr. McGinnis presented with multiple non-healing left lower leg wounds. His assessment included chronic left tibiofibular osteomyelitis with infected hardware due to methicillin susceptible staphylococcus aureus, status post hardware

removal on May 25, 2017. He prescribed intravenous antibiotics. A PICC line was inserted in Mr. McGinnis's arm and he underwent an eight-week course of intravenous antibiotics. (JE5, pp. 1-4) Unfortunately, the infection continued. In late December of 2017, the ankle wound broke open again. (JE5, p. 19) The next day Joseph A. Brunkhorst, D.O. performed another irrigation and debridement surgery; a wound vac was also placed. Despite another PICC line and course of antibiotics, the wounds continued. In January of 2018, another irrigation and debridement was performed. Mr. McGinnis continued to receive IV antibiotics through the PICC line until March 1, 2018. Dr. Harvey then ordered chronic oral antibiotics to suppress the infection. (JE4, JE 5, testimony)

At the request of his attorney, Mr. McGinnis underwent an IME with Sunil Bansal, M.D. on February 6, 2017. (Cl. Ex. 3) Dr. Bansal diagnosed Mr. McGinnis with open pilon-type fractures of the distal tibia/fibula. He assigned 24 percent impairment of the left lower extremity due to a 1 mm cartilage interval of the ankle joint and for dysesthesias in the superficial peroneal nerve distribution. Dr. Bansal restricted Mr. McGinnis to no frequent squatting, climbing or twisting, no prolonged standing or walking for more than 60 minutes at a time and to avoid uneven terrain. (Cl. Ex. 3) It is noted that Dr. Bansal's IME was performed before the majority of the infection treatment.

On May 17, 2018, at the request of his attorney, Mr. McGinnis underwent a second IME. This IME was performed by Robert D. Rondinelli, M.D. With regard to the left ankle and infectious condition, Dr. Rondinelli felt that Mr. McGinnis was not at maximum medical improvement (MMI) because he could have a recurrence of active infection which might require subsequent debridement and other procedures which were not anticipated and unforeseen at that point. However, Dr. Rondinelli provided a preliminary estimate of the resulting impairment expected at MMI. For the left ankle, he assigned 21 percent lower extremity impairment due to the injury and range of motion criteria. Alternatively, he rated Mr. McGinnis according to his gait derangement for which he assigned 15 percent of the whole person. The doctor stated that McGinnis should receive an additional rating for the burden of treatment complications, which in this case was repeated hardware failures and osteomyelitis infections. He felt that taking a suppressant antibiotic for the rest of his life and the permanent placement of antibiotic beads warranted an additional 1 percent of the whole body. Dr. Rondinelli's ratings amounted to 16 percent of the whole person. It is noted that at the time of Dr. Rondinelli's examination, Mr. McGinnis denied any constitutional symptoms such as fever, chills or night sweats and he did not report any problems related to his digestive system. There is no mention in Dr. Rondinelli's report of any ongoing infection. (Cl. Ex. 4)

Defendant employer and insurance carrier obtained a post-hearing report from Jon Gehrke, M.D. as rebuttal to Dr. Rondinelli's report. Dr. Gehrke indicated that he last evaluated Mr. McGinnis on June 12, 2018. At that time, Mr. McGinnis had no signs of any ongoing infection and no signs of ongoing osteomyelitis. Dr. Gehrke also indicated that Mr. McGinnis was continuing on oral cephalexin as a pro-active measure to avoid

an infection relapse; the plan was to perform blood tests at the September 2018 appointment. Dr. Gehrke opined that the April 1, 2015 injury and any permanent impairment was confined to the left ankle and leg. He also opined that Mr. McGinnis did not have any permanent condition which affected his lymphatic system, vascular system, or nervous system. Additionally, Dr. Gehrke noted that Mr. McGinnis had no permanent impairment as a result of the infections. The doctor felt that any altered gait Mr. McGinnis may have was due to his work-related ankle and foot problems, as opposed to any back/hip (body as a whole) condition. Dr. Gehrke was aware of Dr. Rondinelli's report. (Def. Ex. A1, pp. 9.7-9.10)

As of the time of the hearing, Mr. McGinnis continued to take antibiotics twice a day. He testified that he experiences some intestinal issues due to the medication. Dr. Harvey recommended that Mr. McGinnis take a daily probiotic to try to minimize the effects of the antibiotics. (Testimony)

Baker argues the April 1, 2015 injury is contained to the left leg. Mr. McGinnis and the Fund argues that his injury extends beyond into the body as a whole. In support of the body as a whole argument, Mr. McGinnis contends that his injury extends beyond the leg because he is still taking antibiotics for the infection in his leg. He also testified that he experiences some gastrointestinal problems associated with the medications. Additionally, Dr. Rondinelli rated his impairment to the body as a whole due to altered gait from the ankle injury.

However, the preponderance of the evidence does not support the argument that claimant's injury extends beyond his left lower extremity. First, there was no evidence of any active infection in his left lower extremity at the time of the hearing. Although Mr. McGinnis was taking antibiotics as a proactive measure, there was no evidence of any current infection. Just weeks before the hearing, Dr. Gehrke confirmed that his wounds had healed and there was no evidence of any deep infection or DVT. (JE4, pp. 48-49) No doctor has assigned any permanent work restrictions due to the infection. There are several physicians who have offered their opinions regarding functional impairment in this case. As noted above, Dr. Rondinelli assigned an additional 1 percent impairment of the whole body. In his report Dr. Rondinelli explained:

> I believe a 'rating by analogy' should be applied for losses due to 'the burden of treatment compliance (BOTC)', which is described in detail in Appendix B of the AMA *Guides To Evaluation and Permanent Impairment, 6th ed,* pages 607-608, but was not yet developed at the time of the earlier publication of the AMA *Guides, 5th ed*, in 2000. This system allows awarding a series of points for burden of treatment incurred, in this case, to manage hardware failure of his ankle fracture and recurring infections."

(Cl. Ex. 4, p. 3)

I do not find the 1 percent whole person rating from Dr. Rondinelli to be persuasive. As clearly stated, that rating is pursuant to the AMA *Guides, 6th* edition and

pursuant to a system that was not developed at the time of the AMA *Guides 5th* edition. This agency has specifically adopted the AMA *Guides 5th* edition for purposes of the extent of loss or percentage of impairment. Thus, there is no medical expert in this case who has assigned any permanent impairment, pursuant to the AMA *Guides 5th* edition, for the leg infection.

Second, with regard to claimant's gastrointestinal symptoms, no doctor has opined that he has suffered any permanent impairment or requires any permanent work restrictions due to those symptoms.

Third, there is a lack of evidence to demonstrate that Mr. McGinnis suffers from any systemic condition as a result of his April 1, 2015 work injury to his left lower extremity.

Fourth, although there is some mention in the record of an altered gait, there is not substantial evidence to support that the gait is due to any back or hip conditions. Rather, I accept the opinion of orthopaedic surgeon, Dr. Gehrke, who stated that any altered gait is due to ankle and foot problems.

I find that on April 1, 2015 Mr. McGinnis sustained a work-related injury which is confined to his left lower extremity. I further find that Mr. McGinnis has failed to demonstrate that the April 1, 2015 injury extends beyond the left lower extremity.

As noted above, there are several physicians who have rendered their opinions regarding the percentage of functional impairment Mr. McGinnis sustained as a result of the injury to his left lower extremity. With regard to functional impairment for the left lower extremity, I find the opinion of Dr. Bansal to carry the greatest weight. Dr. Bansal utilized the AMA Guides 5th edition, clearly set forth how he arrived at his impairment rating, and provided the rationale for his rating. As such, I find that Mr. McGinnis sustained 24 percent lower extremity impairment. Permanent impairment for the lower extremity is based on 220 weeks. Thus, I conclude that Mr. McGinnis is entitled to 52.8 weeks of permanent partial disability benefits as a result of the April 1, 2015 work injury.

I also find that Mr. McGinnis has permanent restrictions placed on his activities as a result of the left lower extremity injury. On September 7, 2016, Dr. Gehrke assigned permanent restrictions of sit down work only – no standing or walking. (JE4, p. 27) In his September 21, 2017 IME report, Dr. Bansal restricted Mr. McGinnis as follows: no frequent squatting, climbing, or twisting; no prolonged standing or walking greater than 60 minutes at a time; and to avoid uneven terrain. (Cl. Ex. 3, p. 17) I find the restrictions set forth by Dr. Bansal carry the greatest weight. These restrictions were assigned more recently in time than those of Dr. Gehrke. I find Dr. Bansal's restrictions to be reasonable and adopt them as correct. Thus, I find Mr. McGinnis has permanent restrictions as a result of the April 1, 2015 left lower extremity injury as set forth by Dr. Bansal.

Right Lower Extremity

On February 2, 2009, Mr. McGinnis sustained an injury to his right lower extremity, specifically, his right ankle. Following the injury, he treated with Matthew J. DeWall, M.D. Mr. McGinnis sustained a right ankle fracture by bimalleolar equivalent, which required open reduction surgery with screw fixation of the right ankle fracture. The screws were removed in a subsequent surgery. He was off of work for approximately four months. In May of 2009, at the request of Mr. McGinnis, Dr. DeWall released him from treatment without any restrictions. (JE1; testimony)

Mr. McGinnis was able to pursue gainful employment for many years between 2009 and his work injury in April of 2015. However, at the time of the February 6, 2017 IME, Dr. Bansal provided an impairment rating for the right ankle. Dr. Bansal assigned 4 percent of the right lower extremity due to loss of range of motion. Dr. Bansal's opinion regarding impairment for the right lower extremity is unrebutted. I accept Dr. Bansal's opinion regarding impairment of 4 percent of the right lower extremity. Dr. Bansal also noted the same restrictions for his right leg as he did for Mr. McGinnis's left leg. Although Mr. McGinnis worked without formal restrictions prior to the April 1, 2015 injury, I find that Dr. Bansal's restrictions are reasonable and accept them as accurate. (Cl. Ex. 3)

Mr. McGinnis testified in his deposition that because of his right ankle injury he had to change how he performed some of his job duties. For example, instead of jumping over a wall to get a piece of equipment, he would find a safer way to get to the other side of the wall. After he returned to work, he tried not to let his right ankle slow him down. He knew his right leg was weaker, so he protected it. He continues to have symptoms in his right lower extremity. He has pain that starts in his ankle and shoots up the outside of his leg. At times, he has difficulty getting his leg to move. (Def. Ex. F; depo. pp. 106-107) I find that Mr. McGinnis sustained permanent loss of the use of his right leg as the result of the February 2, 2009 injury.

Based on these findings of fact, I must consider the 2009 right leg injury and the 2015 left leg injury to determine the combined effect of these injuries on claimant's future earning capacity. Mr. McGinnis is fifty-five years old. To the credit of both Mr. McGinnis and Baker, he was still employed as a dispatcher at the time of the hearing. He was earning somewhere around $26.00 or $27.00 per hour, with some overtime; he also receives benefits. At the time of the injury he was working as a journeyman. Mr. McGinnis testified that if he was still working as a journeyman HVAC technician he would be earning approximately $34.00-$35.00 per hour.

I found Dr. Bansal's restrictions to be reasonable and adopted them as correct. Dr. Bansal's restrictions are no frequent squatting, climbing, or twisting; no prolonged standing or walking greater than 60 minutes at a time; and to avoid uneven terrain. These restrictions prevent him from working as an HVAC technician. For the last 18

years Mr. McGinnis has worked as an HVAC technician; this is the job he was trained to perform.

Prior to working in the HVAC field Mr. McGinnis worked in retail. However, he can no longer perform his prior retail job because he cannot walk the required amount. He also has some experience in managing staff and feels he could do that type of work if he was allowed to sit. Mr. McGinnis also believes he would be capable of teaching classes in his area of expertise. (Testimony)

Mr. McGinnis is 55 years old. He is intelligent and college educated. He attended Southwest Missouri State for three years, where he studied wildlife management and psychology. He also attended technical college for two years to become HVAC certified. He has taken numerous continuing education classes for his HVAC certification. Although his restrictions preclude him from returning to any type of physical service technician work, he does have transferrable skills. He has continued to work for Baker as a dispatcher. This type of work is available with other employers.

Considering claimant's age, educational background, employment history, ability to retrain, motivation to continue working, length of healing period, permanent impairment, permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that Mr. McGinnis has sustained a 35 percent loss of future earning capacity as a result of the combined effect of these injuries on his future earning capacity.

Claimant is seeking payment of medical expenses as set forth in claimant's exhibit five. In the post-hearing brief Baker states that since the time of the hearing, the only outstanding bills not paid are the out-of-pocket co-pays Mr. McGinnis is seeking for prescriptions. Unfortunately, based on claimant's exhibits it is not clear what prescriptions the co-pays are for or who prescribed the medications. Therefore, I find claimant has failed to prove by a preponderance of the evidence that the co-pays should be the defendants' responsibility.

CONCLUSIONS OF LAW

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

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).

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).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In the present case, I found that Mr. McGinnis failed to prove by a preponderance of the evidence that the April 1, 2015 left leg injury extended beyond the schedule and into the body as a whole. Instead, I found that his injures were limited to the left ankle and leg. As such, I conclude that claimant's April 1, 2015 injury should be compensated as a scheduled member injury.

Claimant's injury involved his left ankle. An injury to the left ankle is considered an injury to the left leg for purposes of awarding benefits on the schedule. Hildreth v. The All Star Group Companies, File No. 5027979 (Arb. November 2016). Therefore, I conclude Mr. McGinnis proved permanent disability related to his left leg as a result of the April 1, 2015 injury.

Having found the impairment rating of Dr. Bansal most persuasive, I conclude that claimant is entitled to an award of permanent partial disability benefits against the employer and insurance carrier equivalent to 24 percent of the left leg. The Iowa Legislature has established a 220-week schedule for leg injuries. Iowa Code section 85.34(2)(o). Claimant is entitled to an award of permanent partial disability benefits equivalent to the proportional loss of his leg. Iowa Code section 85.34(2)(v); 220 weeks equals 92.4 weeks. Claimant is, therefore, entitled to an award of 52.8 weeks of permanent partial disability benefits against the employer and insurance carrier. Iowa Code section 85.34(2)(o), (v).

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 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

In this case, I found that claimant proved a first qualifying injury to his right leg on February 2, 2009. Mr. McGinnis required medical treatment, including surgery for his injury. Dr. Bansal offered an unrebutted medical opinion that claimant sustained a 4 percent permanent impairment of the right leg as a result of his injury. Therefore, I conclude claimant met the initial requirement to establish a first qualifying injury.

Based on the above findings of fact, I conclude that the April 1, 2015 work injury was limited and confined to the left leg. Therefore, I conclude that claimant also established a qualifying second injury.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. 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).

The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995), Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, §§ 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

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.

Based on the above findings of fact, I conclude Mr. McGinnis proved a 35 percent loss of future earning capacity as a result of the combined effects of the 2009 right leg injury and the April 1, 2015 left leg injury. I conclude that claimant is entitled to 175 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

However, the Second Injury Fund is entitled to a credit against this industrial disability for the permanent loss of each of the first and second qualifying injuries. Iowa Code section 85.64. In this instance, the first qualifying injury resulted in a 4 percent

permanent disability of the right leg. As noted above, the leg is compensated on a 220-week basis. Therefore, the Second Injury Fund is entitled to a credit equivalent to 8.8 weeks of permanent partial disability benefits for the first qualifying injury. As noted above, the employer and insurance carrier are responsible for a 24 percent permanent disability of the left leg, or 52.8 weeks of permanent partial disability benefits.

In total, the Second Injury Fund is entitled to a credit equivalent to 61.6 weeks of permanent disability. In total, the Second Injury Fund is obligated to pay claimant 113.4 weeks of benefits. However, the Fund's obligation does not commence until their credit is exhausted.

Prior to hearing Baker paid 62.713 weeks of permanent partial disability benefits which ended on March 7, 2018. (Hearing Report) I found Baker responsible for 52.8 weeks of permanent partial disability benefits. Thus, Baker paid 9.913 more weeks of permanent partial disability benefits than owed. The Fund shall only receive credit for 61.6 weeks of benefits. Thus, I conclude the commencement date for benefits owed by the Fund is December 27, 2017. Therefore, the Second Injury Fund's credit extends from December 27, 2017 through March 4, 2018. Fund liability commences on March 5, 2018 and continues until the Fund's weekly benefits obligations are exhausted.

Claimant is seeking payment of medical expenses as set forth in his exhibit five. 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).

Based on the above findings of fact, I conclude claimant has failed to demonstrate by a preponderance of the evidence that defendants are responsible for any submitted expense which has not already been paid by the defendants.

Claimant is also seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy hearing the case. 876 IAC 4.33. In the present case, I find that claimant was generally not successful against the defendant employer and insurance carrier. Claimant was generally successful in his claim against the Fund. However, 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 form the Fund for other proposes. See Houseman v. Second Injury Fund, File No. 5052139 (Arb. Dec. August 8, 2016). Thus, I conclude costs cannot be assessed against the Fund. The parties shall bear their own costs.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of seven hundred thirty-one and 89/100 dollars ($731.89).

Prior to hearing defendant employer and defendant insurance carrier paid sixty-two point seven one three (62.713) weeks of permanent partial disability benefits at the stipulated rate. Defendants were found responsible for fifty-two point eight (52.8) weeks of permanent partial disability benefits. Thus, defendants are entitled to a credit of nine point nine one three (9.913) weeks of permanent partial disability pursuant to Iowa Code section 85.34(5).

The Second Injury Fund of Iowa shall pay one hundred thirteen point four (113.4) weeks of permanent partial disability benefits commencing on December 27, 2017.

Interest accrues on unpaid Fund benefits from the date of this decision.

Defendant employer and defendant insurance carrier shall be entitled to credit for all weekly benefits paid to date.

Each party shall bear their own costs.

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

Signed and filed this 24th day of October, 2018.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EQP/sam

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.