BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

IZUDIN DUBINOVIC, Claimant, vs. DES MOINES PUBLIC SCHOOLS, Self-Insured Employer, and SECOND INJURY FUND OF IOWA, Defendants.	FILED NOV 12 2015 WORKERS' COMPENSATION File Nos. 5042677, 5047783 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Izudin Dubinovic, claimant, has filed a petition in arbitration and seeks workers' compensation from Des Moines Public Schools, self-insured employer, defendant, and the Second Injury Fund of Iowa.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on April 20, 2015, in Des Moines, Iowa. The record in the case consists of claimant's exhibits I,II,IIA,III,IV,IVA and V; defense exhibits A through F; Second Injury Fund of Iowa exhibits AA through FF, as well as the testimony of the claimant, Arnela Dubinovic, Azra Dubinovic, Theresa Hanson, Fahreta Huskic, Nora Majakic, Timothy Schott, Cathy McKay, and Doug Witt.

ISSUES

The parties presented the following issues for determination in file 5042677, date of injury November 11, 2011:

1. Whether the claimant sustained an injury arising out of and in the course of employment on November 11, 2011.

2. Whether the alleged injury is a cause of temporary disability.

3. Whether the alleged injury is a cause of permanent disability.

4. Whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

5. The extent of the claimant's entitlement to permanent partial disability benefits.

6. The commencement date for any permanent partial disability benefits awarded.

7. Whether the defendants are entitled to credit for Iowa Code section 85.38(2).

8. Whether claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

9. Whether claimant is entitled to an independent medical examination under Iowa Code section 85.39.

The parties presented the following issues for determination in file 5047783, date of injury December 20, 2012:

1. The extent of the claimant's entitlement to permanent partial disability benefits.

2. The correct rate of compensation for the claimant.

3. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

4. Whether defendants are entitled to a credit.

5. Whether the claimant is entitled to penalty benefits.

6. Whether the Second Injury Fund of Iowa is liable for any part of the claimant's industrial disability.

FINDINGS OF FACT

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

Arnela Dubinovic testified she lives in Urbandale, Iowa. She is 32 years old. She is the daughter of claimant. She was born in Bosnia and moved to the U.S. at age 14. She has a younger brother, Arnel. The war in Bosnia broke out in 1992. Her family left Bosnia and lived in other European countries for short times before returning to Bosnia. Her father built their house in Bosnia. It was so damaged they were not able to return to it.

She and her family moved to the U.S. in 1996. They had no money or resources, only some clothes. Her father was the provider in their family. He found a job right away, at a meat packing company. He also went to night school to learn English. He then worked for a roofing company, and was promoted to project manager. He learned English quickly. He paid for her education, her housing, her first car, etc. She has a bachelor's degree in finance and accounting.

Her father started working for the Des Moines Public Schools in 2009. She described him as energetic, fun to be around and to talk to, a good role model. She could go to him for any kind of problem. He was her "rock". He also helped other people who were new to this country. He bought a home for the family in 1997 or 1998, and later sold it for a profit.

Outside of work, he kept busy with household projects. He spent time with his children, going to soccer games and other activities. He had friends who he socialized with. He went running.

He was excited when he started his job with Des Moines Public Schools, but not for long. He became worried. November 11, 2011, is a day she will never forget. She was six months pregnant. She received a call from someone on her dad's cell phone, a lady from the school, Hubbell Elementary, who said he needed help, he could not talk, and to come get him. When she arrived she found him laying down and crying, and he could not talk. The lady told her he had an argument with his boss and had a panic attack.

She took him to the Mercy emergency room. His blood pressure was found to be very high. He was given medication to calm him down. He was released, but he has not recovered. He tried to go back to work but it was not successful. He suffered from depression and anxiety. He was like a different person, and that continues to this day.

Her mother lives with her because she had to separate from her father. This was due to her father's mental illness. He does not socialize anymore. He is not as mentally alert. He is always anxious, or panicking, or says he is about to black out. He can only engage in conversation for a short time. Before his injury, he was very talkative. Now he can only converse for a couple minutes before getting upset. Her mother moved out about four years ago, but she sees him daily.

On cross examination by the employer, the witness, claimant's daughter, agreed she has no personal knowledge of events at the school. She is not aware of any prior mental health treatment for her father. Her father stayed in Bosnia when the family lived in the other European countries.

On re-direct, she stated she did hear from her father about problems he was having at work with his supervisor. He felt they were disrespectful and expected impossible things of him. He lost sleep and feared going to work.

Theresa Hanson testified for claimant. She lives in Van Meter, Iowa. She used to live in Des Moines. She knows claimant because she dated his son, Arnel. They first began dating in 2006. She saw his father about twice a week. She described him as very outgoing, and that he did things to the best of his ability. He did things around the house. He was working for the school district. He was excited when he first got the job. He was a good family man.

He was not anxious or depressed when she first knew him, but around 2010 or 2011, he exhibited these conditions. She noticed a change when visiting him. He looked like he had not slept. He was withdrawn. He no longer worked on their garden. He stated he felt he was doing all the work at his job. She herself has suffered from depression and recognized his symptoms.

When he was taken to the hospital, she heard he had had a "meltdown". After, she noticed he was not happy. He was short tempered. She stopped dating claimant's son at the end of 2013, but she continued to have contact with the family, about twice per month. She has noticed he has gone downhill. He has a lot on his mind.

On cross examination, she agreed she had no personal knowledge of what happened at the school.

Nora Majakic also testified for claimant. Through an interpreter, she testified she lives in Urbandale, Iowa. She knows claimant as he is her uncle. She is Bosnian. She came to the U.S. in 1997. She does housekeeping supervision for the Marriott Hotel, and has worked there 17 years. She described the stresses of her housekeeping work, which has to be done well and on time. There are about 40 housekeeping employees. Sometimes the boss has to help.

On cross examination, she stated there are about 150 rooms at her hotel. Not all 40 employees work at the same time. About 30 work one shift, 10 the other. They clean guest rooms and the common areas. If a complaint was received, she would discuss it with the individual housekeeper who needed to improve. She would expect the employee to accept the direction they had been given.

On re-direct examination, she stated she would try to be nice to the worker who caused a complaint. She would not order them.

On re-cross-examination, she agreed a worker who did not correct the problem could be terminated.

Fahreta Huskic testified for claimant. She lives in Des Moines, Iowa. She is 52 years old. She knows claimant as they were both born in Bosnia-Herzegovena. They knew each other slightly there, but later she knew him better when her family came to the United States in 1998. He was her sponsor here. He signed an affidavit of support and assumed responsibility for her family. They came to the U.S. penniless. The first money they used to buy a car was $3,000.00 he lent to them. He found an apartment

for them and furnished it. He also took them to medical appointments. They became good friends. They saw claimant and his wife on a daily basis. Her husband and she found jobs, and still saw claimant several times per week. They socialized together.

She also worked at the Marriott Hotel, and also at the Continental Western Insurance Company. There she worked as a housekeeper. She did dusting, mopping, sweeping, vacuuming, trash disposal, washing carpets, cleaning bathrooms, cleaning food areas, scrubbing floors, carrying objects, etc. She now works at Farm Bureau. She does the same duties there. She also did those at Marriott Hotel. She has done this type of work for 16 years.

Over the years she has worked with many housekeepers, about 30 at the Marriott, 7 to 9 at Continental Western, and at Farm Bureau more than 30. She has worked with them and had conversations with them. She knows what stresses the work entails. She is not aware of a case like this one. She agreed deadlines have to be met. Her boss is understanding and arranges help for her when a deadline has to be met. If he did not, it would be stressful. Cooperation with coworkers is important, and it would be stressful if she did not have it.

Since coming to the U.S. in 1998, she has observed changes in claimant. They used to go on trips together. Now, they have not done so since 2011, as she cannot communicate with him anymore. She has a part-time job at a coffee bar on weekends and she sees claimant there. He says very little. He appears to be sad. She thinks the change was caused by the problems he had at work, although she did not observe these herself.

On cross-examination, she agreed it was not acceptable for a housekeeper to not get their work done, unless they were not given enough time. She agreed the supervisor should not have to do the housekeeper's work. They should find help for the worker.

On re-direct examination, she stated the supervisor should have a conversation with the worker who fell behind, so they could come to an agreement.

On re-cross-examination, she was unsure how many square feet had to be cleaned at her places of employment. She has never cleaned at an elementary school.

Azra Dubinovic testified for claimant. She lives in Urbandale, Iowa, with her daughter. She has lived with her daughter for about a year. She and claimant dated and married in Bosnia in 1980. They are still married. Before he worked for the employer, claimant was a good husband and a good man. He was a good worker. He was happy.

She has worked since coming to the U.S. at the Residence Inn, Courtyard, and Marriott hotels, as well as Mercy Hospital, and Continental Western Insurance. She did housekeeping work at these employers over a 13 year period. She also worked at a

bakery at Hy-Vee for a year. Her cleaning jobs involved operating a vacuum, cleaning glass and bathrooms, carrying out trash, etc. She cleaned both carpeted and hardwood floors. She worked under supervisors, as well as coworkers. She has worked with about a hundred coworkers. If there is not enough time to finish the work, a coworker helps. A supervisor would arrange assistance if there was a problem.

She noticed a change in claimant after he began working for the employer. She noticed changes in 2011. His jaws were trembling. This was before November 11, 2011, the date of injury. He would go to work in a state of nervousness and fear. He dreaded going to work.

After November 11, 2011, there was catastrophe. He was a totally different person when they "broke" him. In the morning, he would not talk to anyone. Nothing interested him. He would not talk to her or the children. He looked like he was somewhere else.

They separated because it became unbearable. He could not have anyone around him. Nothing interests him in life. He doesn't care about anything—his wife, his family, his work, his life. If he could change, she would be with him. She loves him and feels sorry for him, but she cannot live with him.

On cross-examination, she was unaware claimant was taking medications for a mental condition even before he went to work for the school district. One day he called her and said he could not breathe, and she thought it was a heart attack. But the doctor told him it was depression. This was at a prior job, when claimant worked with a cement mixer. He began taking medications for a time; then he was fine again. She was not aware he had taken medication over a period of years.

She is not currently working. She is on Social Security Disability benefits. She was diagnosed with nerve problems. She agreed she worked with other people at her jobs. She did go to Hubbell Elementary School when claimant got sick. She has never cleaned an elementary school.

Claimant also testified. He is 57 years old, and lives in West Des Moines, Iowa. He graduated from high school. He served in the military in Bosnia. He speaks English but used a translator at the hearing. When he is on medication, he cannot think clearly. He is on some medication today at the hearing. He did not plan to do so, but he felt nervous and started shivering so he took his pills. He feels he can testify.

In Bosnia, he worked in construction and as a driver. He had a good life in Bosnia before the war. He built a house there but it was destroyed in the war. When he arrived in the U.S. he felt safe and hoped for a better opportunity. His first job in America was at a meat packing plant. He left because he had to stand in one spot for a long time and because it did not pay well. He was responsible for supporting his family. He then worked building countertops for about three weeks. His next job was roofing work where he worked about six years. He had an opportunity to advance there and

was promoted to crew chief and later to an estimator. He made between $750.00 and $800.00 per week, which was more than his prior two jobs.

He had injuries in that job. He cut off the tip of his left index finger. He is right hand dominant. This has slightly affected his ability to use his hands. He also injured his right hand and right knee. He had problems with his left knee in 1997.

He was able to purchase a home in 1998. He did additional work on the house himself. He later sold it for a profit. He was happy with his job at the roofing company and had no conflicts with his supervisors. It was a friendly place to work and people listened to each other.

He lives with his son and has for about a month. He used to live in Urbandale. He no longer lives there as he decided to sell his house due to not being able to maintain it.

Defendants stipulated during testimony as to claimant's submitted medical mileage expenses, as well as his submitted costs of co-payments for medication attached to the hearing reports.

Claimant received prescriptions for Lexipro. Claimant only recalls telling his doctor he didn't feel well and his doctor said it was from depression. He took Lexipro for a couple of weeks and then stopped. Claimant does not know why the records show he took it for a longer time. His medications never affected his ability to do his work. To his knowledge no one noticed any change in his work.

He was happy with his job at Midwest Readi-Mix but applied to work for defendant employer, Des Moines Public Schools. Exhibit V, pages 61 through 64, show references he used in his application. On February 10, 2009, claimant became certified as a second class fireman. The school system requested he train for that position.

His job with the school involved sweeping floors, vacuuming, cleaning restrooms, etc. There were different levels of employment. A first assistant works the second shift and is a level above sweeper. The level above first assistant is a chief and supervises the first assistant. A zone specialist supervises the chief. Each level has higher pay.

Claimant's primary care doctor at the time he applied for the job conducted a physical prior to claimant's employment. He stated claimant was fully qualified to perform the essential functions of the job as of June 9, 2009. Claimant began work June 22, 2009. He went from school to school doing custodial work. His benefits included sick leave, vacation, etc. after working a month. The probationary period was six months and he received a raise at both three months and six months.

During the first year he worked there, there was talk of layoffs. He had some minor problems with his supervisor but nothing serious. In 2010, he was assigned to the Samuelson school where he worked for about a year. (Exhibit V, page 70) He had a chief and a supervisor. At one point Alonzo, the supervisor, told him to slow down as

he was doing too good a job and they were trying to keep two jobs going. Claimant became a first assistant. This required a "fireman's" license. This was so he could work with boilers, and the position paid more, over $16.00 per hour as opposed to over $14.00 per hour previously. There was a union for employees and each job had its own job description. With a fireman's license, he was in line to become a first assistant.

Claimant was asked to help a female co-worker. He would not have minded helping for a day or two, but it went on for several days. Claimant became a first assistant. He was earning $15.46 per hour. (Ex. V, p. 70) But when he was moved to Central Campus on August 14, 2010, his pay was reduced to $14.93 per hour. He states the employer was not following the rules. Claimant brought this to the attention of the union. He was called a "stubborn man".

He also had a problem with the chief at Central Campus, who referred to claimant as a "left over" he had to accept. He felt he was being disrespected.

In the spring of 2011, claimant had problems with his right knee. He had strong pain and his knee would lock up. It was hard to work like that. He underwent surgery in June 2011. He was off work for a period of time. When he returned, he had difficulty doing his work with his knee condition, especially when he began working at Hubbell Elementary. Still today he has trouble with his knee when he has to get down on his knees to do his work.

He had to work at Brody Middle School, which was being renovated. He had a problem there with a supervisor not respecting him. On a hot day, claimant felt dizzy, and his heart started beating faster. The supervisor was working with him. When claimant told her he didn't feel well, she said she didn't care, he needed to do the work like everyone else.

The employer used job performance reviews. (Ex .V) They show good reviews except for the August 30, 2011, review, which notes tardiness or absence. Before he started working at Hubbell, no one told him there were any problems with his work. He was paid a shift differential of 35 cents per hour for the shift he worked.

Exhibit V, pages 72-73, shows the requirements of a chief position. Claimant feels he was qualified for those positions, but he was turned down. He took it well and respected the decision, in this case. In late September or early October, he put a bid in for another position and obtained his job at Hubbell. That job required the fireman's license. For the first two weeks, he had the right to change his mind and go back to his old job. This was important to him. His chief at Hubbell was Doug Witt. The principal was Timothy Schott. The school building has eight or nine classrooms that were very dirty, with books, pencils, paper clips, etc. on the floor. He worked on 30 classrooms, hallways and stairs. The bad rooms had recently been remodeled. Carpeted rooms presented a challenge because the vacuum cleaners did not pick up everything and he had to crawl under the desks to pick things up. The kneeling was hard on his knees.

He estimates he had to pick up around a thousand pieces of trash in those eight or nine rooms. In the other 20 or 22 classrooms, he estimates picking up 200 pieces.

He also cleaned hard wood floors, such as in the arts room. He had to sweep and scrub those floors. He also had to clean stairs, scrub hallways, clean glass, and use scrub machines on the gym floor. Claimant was the only cleaning person and was responsible for the whole school except for the cafeteria. The chief, Doug Witt, did those.

Claimant discussed with Doug Witt his problems keeping up with his work. He told Witt about the messy rooms and suggested he send an email to the principal to ask the teachers to have their children be more respectful. Witt did not do anything to help him with the work, but said he would send an email to the principal.

During the first two weeks, he asked his chief at least three times if he was doing his job correctly. Witt told him he was doing fine. He only greeted the principal when he saw him. Claimant assumed the problem would be solved by Witt, and the two week trial period passed. Claimant lost his right to go back to his old job. However, he did not receive any extra help. Prior to November 11, 2011, which was after the two week period, claimant twice talked to his chief about the problem.

October 17, 2011, claimant left 25 pencils on the floor in one of the rooms. When he came into the classroom and saw how much mess there was. With crayons, scissors, papers, erasers, paperclips, etc. on the floor, he realized he would need double the time to clean it. Claimant remembered how his chief was not responding to his complaint, so he intentionally left the pencils on the floor to bring attention to the problem.

He did not consider talking to Doug Witt's supervisor about the problem because he had been told several times Hubbell was a special school, and he hoped he and his supervisor could resolve the problem. Exhibit V, page 4, dated October 17, 2011, shows claimant met with Principal Schott. Claimant asserts the only truth in that document is the meeting was held. He states he doesn't remember it very well. He remembers being summoned to the meeting by Mr. Schott and being asked to sit down. Present at the meeting was claimant, Mr. Schott, and Doug Witt. It lasted about 45 or 50 minutes.

At the meeting he was told certain things needed to be resolved. Claimant told them he felt like he was being interrogated. Mr. Schott did most of the talking. He said when claimant cleaned something, he should clean everything. This disappointed claimant. Claimant asked again what the problem was, but was told "we'll get to that". Claimant then realized it was probably about the 25 pencils, and asked if that was it, and was told it was. Claimant told him he had asked his supervisor twice to send an email about the pupils, as they were the principal's students, and ask them not to leave such messy classrooms. He felt if the other classrooms could be left in good condition, these could be also. Claimant felt he had been doing a good job, but he did not feel he

could do his job if he had to pick up a thousand pieces of trash. Mr. Schott was very strict and said, "It's your job and you have to do it". Mr. Schott also said something about claimant "chasing away" the man who used to do that job, but claimant pointed out he had the license and the other man did not. Claimant was becoming upset. He told Mr. Schott wherever he had worked in the past he was known for the quality of his work and never had a problem. Mr. Schott responded, "You never worked for me before".

The chain of command is specialist, who is above the chief, who is above claimant as a first assistant. Claimant states the principal was not really his boss. Claimant had asked the chief to report this but nothing happened. The chief did not feel there were that many pieces of trash.

Claimant had trouble sleeping that night. The next day, claimant ran into Principal Schott, and told him he would like to discuss it further. He said he did not have time but perhaps on Thursday, but that meeting did not occur. Claimant did meet with him the next week, on October 26, 2011. Claimant learned of this meeting through his chief, who said the principal found time to talk to him.

Claimant does not feel he was disrespectful to anyone in the first meeting. At the second meeting, things went badly. Claimant told Schott the chief was not listening to his complaints. Claimant felt Mr. Schott liked to act like an expert on cleaning even though he was a principal. He suggested claimant bundle up all the pencils from the floor each night and document how many he had to pick up. Claimant said this would only slow him down. He also suggested claimant visit the classrooms, introduce himself, and ask the students not to leave such a mess. Claimant felt this was not part of his job.

The meeting lasted 70 minutes. Claimant had a splitting headache after the meeting. Claimant had to take some time off from work. He didn't feel well the next morning, and didn't know how to relieve the stress. He took Thursday and Friday off, then returned to work the following Monday. He felt he was then treated by Doug Witt even worse than before. He demanded claimant listen to him and respect him. He asked claimant why he took two sick days.

Claimant was able to work that week. November 7th through November 9th, Doug did not work, so claimant had to do his work on the bathrooms for him. A substitute did claimant's work for three days. The rooms were in bad condition after that. Doug Witt returned to work November 11th, and he saw how bad the rooms looked. He told claimant to take as much time as he needs, he knew claimant would do a good job. Claimant worked through the night, taking a couple of short breaks.

On November 11, 2011, claimant came to work. His chief, Doug, came to his room and slammed the door. He leaned back in the chair and asked him what happened the night before. Claimant told him he left a note saying he did not have time to vacuum four rooms. He replied they were still claimant's responsibility. Claimant

states he was told to leave a note if necessary. Doug said he should have let something else go un-cleaned, not those four classrooms. He told claimant he didn't care if that disappointed claimant, but that was the way it was to be done. Doug then showed him where to place some chairs for a music event that night. Claimant asked him why he was acting like that, there was no need for it. Claimant then, in his words, "flipped out", and had a nervous breakdown. He stated his daughter accurately described his state that day.

Defendants called as a witness Doug Witt. He is employed at Hubbell Elementary School as chief custodian. Before that he was chief custodian at another school, and first assistant at Hubbell in the past. His duties are to take care of custodial work throughout the school, cleaning up after breakfast and lunch, etc. He also does snow removal. He cleans a portion of the school first thing every morning. Over the years he has worked with other custodians. Normally he had two assistants, but one retired and he has had short-term workers since then.

In 2011, claimant began working at Hubbell. Claimant worked 2:00 to 10:30 during the school year, and the witness only saw him a couple hours per day when their shifts overlapped. During the summer they worked together 7:00 a.m. to 4:00 p.m.

From August 2011 to November 2011, when the witness met with claimant, he states he never yelled at claimant, or treated him disrespectfully, used profanity with him, or threatened him in any way. He had no power to fire claimant or take any adverse action against him. If there were complaints from teachers about claimant's "run" the night before, he would talk to claimant about it. Mr. Witt did receive complaints about claimant's work, such as pencils and other items being left on the floor of the classrooms, along with rest rooms not being cleaned properly. Mr. Witt brought these to claimant's attention and claimant was not pleased. Claimant would question what he was being told. This was not consistent with their past contact. Claimant did not want to take criticism. If Mr. Witt explained how claimant was to deal with the pencil problem, claimant had other ideas how to do it. Mr. Witt did not have problems like this with other assistants. He tried to work with first assistants, including claimant, as a team. He does not feel he ever treated claimant badly. He denies slamming the door of the office for their meeting; he closed it because it was necessary to do so to have privacy. He has never heard of anyone else treating claimant badly at work.

The teachers were the ones who complained about claimant's work. Those complaints were shared with claimant, who did not react positively. Claimant never filed a grievance over the way he was treated.

Eventually a meeting was held to discuss claimant's job performance. The concern over pencils, crayons and other items being left behind on the floor was discussed. The meeting was in the principal's office. Mr. Schott led most of the discussion. No one yelled at claimant, but after a time Mr. Schott did become upset. Mr. Schott explained to claimant he needed to pick up the pencils and crayons. Claimant felt the children should do it. Claimant spoke to Mr. Schott in an aggressive or

angry manner. The witness would not have spoken to the principal of the school in that way without fear of being reprimanded. Mr. Schott did not respond well to claimant's tone; he did raise his voice but did not shout. No one threatened claimant during the meeting.

To both Mr. Witt and Mr. Schott, claimant initially argued the children should pick up the items. By the end of the meeting it was made clear it was claimant's responsibility. Claimant did not seem happy about this.

Mr. Witt was not present when claimant left work on November 11, 2011. He disputes claimant's version of a meeting that day where the door was slammed. Mr. Witt recalls again discussing with claimant the need to pick up the pencils. The witness learned the next day of claimant's mental breakdown. Claimant eventually returned to work at Hubbell, and they worked together again. Claimant worked through the rest of the school year, through the summer, and into the fall of 2012. They would have conversations about their families, politics, etc. Claimant also told him about his life in Bosnia, and that the war exposed him to horrific things. He lost his home, his village, and an incident he witnessed where a mortar round hit a school and killed many children.

On cross-examination, Mr. Witt stated his immediate boss was Mr. Schott, and then Doug Smith. The witness had no involvement in performance appraisals. Kyle Black was a specialist, and he signed one of the appraisals. (Ex. V, p. 3)

On cross-examination by the Second Injury Fund of Iowa, Mr. Witt could not remember when claimant started at Hubbell in 2011. He appeared to be physically able to perform his duties, and he never asked for any accommodations. He did not report anything he was unable to do.

Timothy Schott testified he is the secondary school executive director. He does not supervise custodial staff. In 2011, he was principal of the Hubbell elementary school. He supervised the staff although the custodial staff was not under his direct supervision, but he did deal with complaints about the custodial staff. Claimant was the "night man". There were complaints about claimant's work. Doug Witt, the head custodian, reported concerns about claimant not cleaning up classrooms. Exhibit 5, page 4, shows an email summary from the witness to Doug Smith, who was the custodial supervisor. It refers to the October 17, 2011, meeting with claimant. Mr. Schott recalled how the meeting became tense. Claimant asserted the children should be responsible for the cleaning of the classroom. Claimant was not open to suggestions, and did not appreciate being critiqued. Mr. Schott has never had to have a similar meeting with other custodial staff members. Claimant was not being asked to do anything that other custodial staff had not been asked to do. Claimant appeared to resent Mr. Schott being involved. Most of the conversation centered around claimant's thought that the students should do more of the cleaning. By the end of the meeting, Mr. Schott felt a consensus was reached that the school would not be requiring the students to do the cleaning, but Mr. Schott would talk to the teachers about asking

students to try to clean up after themselves more. This would be part of teaching responsibility to students. The meeting ended with a handshake. After that meeting claimant reported improvement in the rooms being better prepared for cleaning.

A few days after this meeting, claimant requested another meeting which occurred on October 26, 2011. Claimant stated he did not want to be forced to do things in other ways; that he felt Mr. Schott was comparing his job with Doug's; that Doug had ignored his earlier complaints; and he resented Mr. Schott's involvement. Again, the meeting ended with a handshake but no decision was made as to any changes on Mr. Schott's part.

His impression was at the first meeting claimant wanted the mess left in the classroom to teach the kids a lesson. Mr. Schott agreed students needed to be taught responsibility, but also needed a clean classroom in which to be taught. The witness was hopeful claimant would make the requested changes.

Mr. Schott never observed Mr. Witt treat claimant in a manner that was unprofessional or inappropriate. The witness also denied ever treating claimant in this manner. Mr. Witt never treated other custodial staff in an improper manner.

On cross-examination by claimant's attorney, Mr. Schott agreed he had not invited Doug Smith to be part of the meetings, even though Mr. Smith would be claimant's supervisor.

On cross-examination by the Fund, Mr. Schott agreed claimant never indicated he could not perform his work duties.

On re-cross-examination by the employer, claimant agreed he could understand most of what is said to him in English, and he can be understood by others. He can read a newspaper in English.

When he was in Bosnia, he was involved in war activities. But, he did not discuss war experiences with his mental health professionals. They would not be aware of those experiences. He does not think he has any side effects from those experiences. He did observe people sustain severe injury. He was shot at during the war. A few friends of his sustained severe combat injuries. He observed dead bodies but not up close. He did not observe dismembered bodies.

He had mental health treatment from his family doctor even before going to work for the school system. Exhibit A, page 2, is an office note from August 9, 2006, which notes depression and job stress, and a prescription for Lexipro. He agrees he was given Lexipro by his doctor. Exhibit 1, pages 13-14, a note from Mercy Clinic dated August 22, 2007, also notes claimant was depressed and anxious for three months. Claimant does not remember this but states it is possible. Exhibit 1, pages 14-15, dated December 14, 2007, also notes depression. A February 7, 2008, note (Ex. 1, p. 15) again shows depression. Claimant agrees that was about the time he started taking

medication. He has no idea what it was for. He went to the doctor once, told him he felt sluggish, and the doctor told him he was depressed and this medication would help. He took it for a couple weeks, then stopped. He does not know what caused his anxiety and depression at that time. He was not working for Des Moines Schools at that time.

He remembers taking Paxil from Robert Callahan, M.D. He told the doctor he had pain in his neck and tension, and the doctor told him he was depressed. He was unaware his doctors were noting chronic depression and anxiety.

At the meeting with Mr. Schott and Mr. Witt, he felt it was inappropriate for the principal to be involved. The principal was not his direct supervisor. Claimant did not make a complaint about this. He did ask the union to be represented at the meeting. He thought Mr. Schott was sticking his nose into something that was not his business, and this made him upset.

He agreed his job was to clean up the classrooms. What upset him was he told his chief twice it took him more time to pick up the items on the floor than it did to vacuum the floor. He did not receive a formal reprimand, only verbal.

He also was seen by Steve Mitchell, M.A.. He concluded claimant's perception of the weight he carries is greater than the reality of it. (Ex. 2, p. 109) Claimant tends to be hurt by any negative comments. He takes things personally, and obsesses over it, then wants to quit his job because of the criticism. (Ex. 2, p. 105)

Claimant was evaluated Eva Christensen, who concluded he perceives he was treated disrespectfully. (Ex. 2, p. 220)

Claimant was treated by Sharon L. Koele, M.D. On February 18, 2013, Dr. Koele noted claimant denied any significant pain in his right arm at this time. Claimant agreed that was true. Today, he has no pain in his right arm.

On cross-examination by the Fund, claimant indicated in Bosnia he drove a dump truck. It required a special license. When he worked for the roofing company in the U.S., he advanced to be an estimator, where he went to houses and gathered information. He did not have knee problems then. His right knee would not prevent him from driving a vehicle today. But when he is in pain, he uses his left leg to drive. He has a valid driver's license. His right wrist sometimes prevents him from driving. His hand gets heavy after 40 or 50 miles of driving. He last drove a car the day before the hearing. His right hand problem probably would prevent him from doing his estimator job because it required climbing a ladder.

He had surgery in 2011 on his right knee. It did help but not completely. The pain is less than before. His family doctor referred him to Steven Aviles, M.D. July 26, 2011, was the last time he visited Dr. Aviles.

He fractured his right wrist in 2012. His wrist fracture eventually healed.

He has not worked for the employer since July 2013. He has not received care for his right wrist since that time. He has received care for anxiety and depression. He is receiving Long-Term Disability benefits for a mental condition as of April 2014. He has also applied for Social Security Disability benefits. Claimant's attorney filled out the application. (Ex. EE, p. 9-12) His application was based on harassment at work, although claimant denies ever using the words harassment, bullying or discrimination.

Dr. Koele issued a statement he was not able to work due to anxiety and depression. No doctor has told him he is unable to work because of his right wrist fracture, or due to his right knee condition.

On re-direct examination, claimant stated he has seen Mark C. Taylor, M.D., twice. As an estimator, he had to climb onto roofs, often very high. Dr. Taylor's reports on claimant's right knee and right wrist recommended claimant only climb ladders occasionally.

Exhibit 1, pages 29 and 33, are medical records indicating chronic depression and anxiety, but also note "happy" for claimant's mood.

He was in the army in Bosnia, and engaged in fighting. No one has diagnosed him with post-traumatic stress syndrome. He does not have flashbacks. His explanation for his breakdown on the date of injury is the way he was treated by the employer. He feels if it was from the war, it would have happened much sooner.

On re-cross-examination by the employer, he agreed he has had memory issues on a few occasions.

Catherine McKay testified for defendants. She is director of risk management for the employer. She is aware claimant had a number of injuries while employed with the school system. He had a November 2012 right wrist injury, and he was paid temporary total disability benefits from December 20, 2012, through March 18, 2013. He was also paid permanent partial disability benefits for a two percent impairment of the arm, or five weeks.

CONCLUSIONS OF LAW

The parties presented the following issues for determination in file 5042677, date of injury November 11, 2011, the alleged "mental mental" injury:

The first issue is whether the claimant sustained an injury arising out of and in the course of employment on November 11, 2011.

Nontraumatically caused mental injuries are compensable under Iowa Code section 85.3(1). Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995).

Under Dunlavey, mental injuries caused by work-related stress are compensable if, after demonstrating medical causation, the employee shows that the mental injury

was caused by work place stress of greater magnitude than the day to day mental stresses experienced by other workers employed in the same or similar jobs, regardless of their employer. Id. at 857.

Both medical and legal causation must be resolved in claimant's favor before an injury arising out of and in the course of the employment can be established. To establish medical causation, the employee must show that the stresses and tensions arising from the work environment are a proximate cause of the employee's mental difficulties. If the medical causation issue is resolved in favor of the employee, legal causation is examined. Legal causation involves a determination of whether the work stresses and tensions the employee experienced, when viewed objectively and not as the employee perceived them, were of greater magnitude than the day to day mental stresses workers employed in the same or similar jobs experience routinely regardless of their employer.

The employee has the burden to establish the requisite legal causation. Evidence of stresses experienced by workers with similar jobs employed by a different employer is relevant; evidence of the stresses of other workers employed by the same employer in the same or similar jobs will usually be most persuasive and determinative on the issue. Id. at 858.

An employee who receives a purely mental injury arising from the employee's work may receive workers' compensation benefits. Asmus v. Waterloo Community School Dist., 722 N.W.2d 653, 656-67 (Iowa 2006). Generally, the employee must provide proof of both medical causation and legal causation. *Id.* at 657. "Medical causation simply requires a claimant to establish that the alleged mental condition was in fact caused by employment-related activities." *Id.* Medical causation requires a causal connection between the mental injury and the employment. Blanchard v. Belle Plaine/Vinton Motor Supply Co., 596 N.W.2d 904, 908 (Iowa Ct. App. 1999). Legal causation "presents a question of whether the policy of the law will extend responsibility to those consequences that have in fact been produced by the employment." Asmus, 722 N.W.2d at 657. In Iowa, an employee must "establish that the mental injury was caused by workplace stress of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs, regardless of their employer." Dunlavey, 526 N.W.2d at 858; See also, Humboldt Community Schools v. Fleming, 603 N.W.2d 759, 763 (Iowa 1999); Blanchard, 596 N.W.2d at 909. Village Credit Union v. Bryant, Ia. Ct. Appeals, May 23, 2012, (file 5024553).

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Expert testimony is necessary to prove the permanency of a mental injury. The Court of Appeals allowed that: "While in some instances, permanency may be inferred from the nature of the injury, in the case of mental injuries, that inference can only be made by an expert." Broadlawns Medical Center v. Sanders, No. 18-1643, filed June 17, 2009 (Iowa Ct. App.).

Claimant had been prescribed Lexipro, for anxiety and depression, prior to this injury and prior to working for this employer. Claimant experienced the psychological

trauma of seeing war first hand, but he states he suffers no lasting psychological effects and feels he does not suffer from post-traumatic stress disorder.

Claimant's current inability to work is based on the "meltdown" he had at the fateful November 11, 2011, meeting with his supervisor and the school principal. At the meeting, claimant stated he felt the students should pick up after themselves and not leave a mess for him to clean up. He wanted the superintendent to force the students to do this. Claimant asserted his own ideas on how the school was to be run and how the rooms were to be cleaned.

Mr. Schott showed great patience with claimant, even when claimant's comments were borderline insubordinate. Mr. Schott offered to let claimant take as much time as he needed to do his assigned work. However, he was told it was not his job to tell the students to be neater.

Claimant had exhibited a history, while working at various schools, of complaining that various supervisors "disrespected" him. It is clear claimant was overly sensitive to valid and reasonable criticism of his work.

When claimant saw a messy classroom one night, he decided to teach the students a lesson and he intentionally left 25 pencils on the floor for the next day. In other words, claimant took it upon himself to discipline students, which was clearly not part of his job and outside his authority as a custodian. He was being paid to clean up the mess in the classrooms at the end of the day, and instead he intentionally made the mess worse.

This conduct alone might have been justification for his dismissal. But instead, Mr. Schott showed great patience with claimant. He set up a meeting to discuss the situation. But at the meeting, claimant again exhibited his attitude of thinking he had the authority to change how students left the classroom at the end of the day. He felt Mr. Schott should impose a rule about not being messy. Mr. Schott instead quite commendably offered to have claimant introduce himself to the students and ask them not to leave a mess. Claimant was not interested in doing so.

At a second meeting, claimant made further demands of the administration, which were again not within his authority to make. Claimant then suffered a nervous breakdown and left his job with the schools.

Claimant bears the burden of proof to show he has suffered an injury arising out of and in the course of his employment. In this case, he alleges a "mental mental" injury, that is, a psychological injury stemming from unusual stress rather than a physical injury to his body.

Claimant was upset at both the October 17, 2011, and October 26, 2011, meetings with his supervisor, Mr. Witt, and the principal, Mr. Schott. Claimant stated the meetings were making him mad. He had to take some time off after the second

meeting. When he returned, he found the classrooms to be messy again, and he left four of them undone. Mr. Witt criticized this, telling him he had to get his work done. Claimant became so upset he went to the school nurse, Michelle Bebe, RN. (Ex. II, p. 1) He was crying and upset. He said he would kill himself if he had to work with Witt and Schott again, and asked for medical attention. Claimant was hospitalized and found to have acute agitation, anxiety and suicidal thoughts related to workplace difficulties. He was prescribed Lorazapam, and later began outpatient psychiatric care. (Ex. II, pp. 2-6, 14) He continues to receive that care.

Claimant was treated by Shaad Swim, D.O. (Ex. II, pp. 25-50) He found claimant to have adjustment disorder mixed anxiety and depression related to work. (Id., pp. 48-50)

In December 2011, and January, 2012, claimant treated with Robert Callahan, M.D., his personal physician, for anxiety and depression. (Ex. II, pp. 51-70)

He then treated with Sharon Koele, claimant's psychiatrist, who noted claimant was very negative about his job, that he felt discriminated against by his bosses, and that he got into several arguments with coworkers. (Ex. II, pp. 117, 121, 125, 128) She initially diagnosed him with adjustment disorder and mixed emotional features, but she later changed the diagnosis to generalized anxiety disorder related to his work. She took claimant off work on July 12, 2013, due to anxiety and depression. (Ex. II, pp. 128-130) Claimant was later terminated for non-attendance. He has not returned to work.

Eva Christensen, Ph.D., a psychologist, conducted an IME of claimant on August 22, 2014. She felt his prior mental health issues were exacerbated by his work and the November 11, 2011, incident. (Ex. II, p. 219) She felt he had suffered permanent impairment and was unlikely to improve.

Dr. Koele also stated claimant's work exacerbated his underlying anxiety and depression. (Ex. II, pp. 216-217) However, the record also shows claimant later told personnel at Broadlawns Medical Center he had not been completely honest with Dr. Koele because he felt she was judging him for his Bosnian accent.

Both Dr. Koele and Dr. Christensen felt claimant clearly had a mental condition before he started working for this employer, but his condition was mild and not disabling until claimant perceived the stresses of this job as overwhelming, and had his breakdown. They feel this constitutes an aggravation of his pre-existing condition.

Thus, there is evidence claimant has shown his current mental condition was caused by his work in the form of an aggravation of his pre-existing mental condition. It is concluded the greater weight of the medical evidence shows a causal connection between claimant's work for the school system, and his breakdown and resulting mental condition. Dr. Koele and Dr. Christiansen both so stated. (Ex. II, pp. 217, 219) Claimant has carried his burden of proof to show the first prong of the two-part Dunlavey test, that is, that his work aggravated his pre-existing mental condition of

depression, adjustment disorder, and anxiety, and as a result, he suffered a work injury arising out of and in the course of his employment.

However, under Dunlavey claimant has an additional burden to meet. He must show the workplace presented stress greater in magnitude than that experienced by other workers in the same or similar jobs.

The evidence presented on this part of the test consisted of the testimony of three witnesses, each of whom was either a family member or friend of claimant, including his spouse. Each of them had performed non-residential custodial work, although not for the defendant employer. Each described that such work involves a quota of work to be accomplished within a given amount of time. Each stressed cooperation and communication, trust and cooperation between the custodial worker and his or her supervisor as important. None of the three had done custodial work at a school.

If anything, this testimony showed that the work expectations for claimant were similar to that expected of other custodial workers. There was no evidence that claimant's work expectations were greater or unusual, just that a quota of work to be done within a given time was stressful but common to all such positions.

There was no evidence from any witness other than claimant concerning the normal stress experienced by a custodial worker in other schools. Yet claimant's chief complaint concerned aspects of custodial work unique to school custodial work - picking up after young students. The only evidence of the normal stress associated with that work was the testimony of Doug Witt, who had done claimant's same job as well as other custodial jobs in the school, in addition to supervising several school custodians over the years. He basically indicated claimant's workload was not unusual and the expectations were not uncommon or unreasonable. He noted claimant's work generated complaints from teachers, and when these problems were brought to claimant's attention, instead of working to comply with his supervisor's suggestions, claimant argued with them, resisted implementing them, and on one occasion intentionally added to the mess he was expected to clean up.

Thus, the greater weight of the evidence shows the work expectations and stresses claimant experienced as a custodian for the school system were not unusual, but were common. Other custodial employees had the same or similar expectations placed upon them, without any problems.

Prior to working for the school system, claimant had been treated for and was taking medications for depression, anxiety and stress. Claimant's conduct in being insubordinate, argumentative, etc., was no doubt influenced by his mental condition. Claimant, in his post-hearing brief, suggests the severity of the breakdown he suffered proves it was from unusual workplace stress. That argument is rejected. The fact claimant did suffer a debilitating breakdown is indeed tragic, and he is deserving of sympathy for the burden he now carries in his life. A mental condition that causes this

degree of suffering is a terrible way to live one's life. But the degree of his mental illness cannot serve to establish claimant's burden to show it was his workplace conditions that caused the mental illness. He clearly had this illness before he worked for this employer. His illness made him unable to cope with the routine, reasonable demands of the job, especially when he exaggerated those demands in his own mind to the point where he felt persecuted and disrespected. But, he also has to meet the second part of the test, to show that his current condition was caused or aggravated by unusual workplace stress.

The record clearly establishes that most of claimant's perceived slights, disrespect, and stress existed only in his own mind. The school administration showed remarkable tolerance for claimant's demanding attitude. Yet claimant continued to exceed his authority as an employee, demanding changes in school policy that were not his to make. Indeed, claimant, in his testimony in response to questions from his attorney, expressed the opinion that he felt decisions on whether students should be disciplined for being messy or told not to leave things on the floor were to be the subject of joint decision making between himself and his employer.

Nothing could be further from the truth, and claimant should not have been encouraged in this line of thinking. Claimant was an employee, working as a custodian. He was not part of the school administration or a teacher. His job duties and authority did not extend to deciding matters of school policy for students. Yet claimant felt he did have that authority, that he was somehow part of the administration of the school and not a custodian, and that when he suggested, or sometimes demanded, changes in the school's policies, he felt "disrespected" when his demands were not met, and this caused self-imposed stress. Nothing in the conduct of Mr. Schott or Mr. Witt or any school administrator or employee can be faulted in this record. As noted, they in fact could have disciplined claimant or even fired him for his conduct, but instead they commendably tried to work with him and meet his concerns as much as possible.

But there is no unusual workplace stress in this record. The stress and demands of his job were reasonable and common among custodians, both in the school system where he worked and in the general private sector. Basically, he is saying that asking him to do his job imposed unreasonable stress on him. The job requirements were not unusual. His supervisors were more than patient with him. He was given chances to improve, yet he resisted such suggestions, even argued with them. The record contains no evidence of unusual stress or pressure on claimant. He had a quota of rooms to clean each shift, but the quota has not been shown to be unreasonable. He has not shown the second prong of the two-part Dunlavey test, that is, that his alleged psychological injury was caused by workplace stress of a greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs, regardless of their employer, as required by Dunlavey. It is unfortunate claimant developed his mental illness and resulting breakdown, but it was not caused by any unusual workplace stress, and thus the employer is not liable to him for disability benefits. It is specifically concluded claimant has failed to carry his burden of proof to show this second part of the Dunlavey test. The greater weight of the evidence shows

claimant's job did not involve unusual workplace stress as required by the Dunlavey test. Thus, claimant has failed to carry his burden of proof to show he has suffered a work related mental-mental injury.

Claimant's counsel, in his post-hearing brief, does not accept the clear two-part test of Dunlavey as binding, stating the Supreme Court set a policy by a common law power it did not have. He feels the Supreme Court should change its Dunlavey decision. That argument is specifically rejected. This deputy workers' compensation commissioner is bound to follow the clear, and logical, precedent of Dunlavey and its two-part test. It is clear claimant's counsel intends this to be a test case seeking to overturn Dunlavey. This may explain a petition filed for a mental-mental injury where claimant clearly did not have unusual stress in his work.

It must be noted this case was overly long and complex. The hearing, which is normally scheduled for three hours, consumed six and one half hours. The written exhibits are voluminous. Yet it must also be said that although a mental-mental case presents a claimant with a challenging burden of proof under the Dunlavey case, this record presents little, if any, evidence in support of the petition. At most, claimant has shown he was treated no differently than other employees, yet he, in his own mind, perceived insults that were not there, escalated discussions with superiors into confrontations, was insubordinate with supervisors, and actually intentionally made the clutter and mess he was supposed to clean worse, in order to make a point. If this were an unemployment benefits case and claimant had been terminated, it would have to be concluded he was discharged with good cause. Yet claimant seeks to meet a much more demanding burden of proof in this case, and has failed to do so. The case clearly had no merit yet was pursued with vigor. Claimant's attitude that even though he was an employee and not part of the administration of the school or part of the supervisory staff for custodial workers, nevertheless, he expected his supervisor and the school principal to allow him to help determine school custodial policies. This theme of expecting supervisors to allow employees to act as equals in the making of policy was stressed by claimant, and encouraged by his attorney, throughout the hearing. This is not the way workplaces operate. They are not a democracy. Employees are expected to take instructions from their supervisors, and not argue with those supervisors, be insubordinate to those supervisors, or demand an equal voice in setting policies. Yet claimant's attitude shows he felt he was entitled to a say in his own work rules, and when he found his ideas were not controlling, his self-perception of this as disrespecting him became overwhelming for him in light of his fragile mental state from his mental illness. The employer did nothing wrong in this case, and in fact, showed great patience and restraint with claimant, to its credit. Claimant did nothing wrong either. He did not ask to have this mental illness. It has had a devastating effect on his life. But nothing on the part of the employer or the workplace can be said to be unusually stressful, which claimant must show to prevail. He has not carried his burden of proof to show a mental-mental injury.

The parties presented the following issues for determination in file 5047783, date of injury December 20, 2012, involving claimant's right upper extremity:

The first issue is the extent of the claimant's entitlement to permanent partial disability benefits.

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).

Claimant suffered an admitted work injury on December 20, 2012, when he tripped and landed on his right hand. (Ex. IV, pp. 1-2) An x-ray did not show a fracture. (Ex. IV, p. 7) But an MRI did show a radius fracture. (Ex. IV, p. 11) Barron Brehmner, D.O., recommended claimant wear a splint and imposed work restrictions. (Ex. IV, p. 13) Claimant received temporary total disability benefits and began physical therapy. Dr. Brehmner conducted further x-rays in November 2013, which showed a healed fracture, and no abnormalities. (Ex. E, p. 1)

Dr. Aviles stated claimant had no permanent impairment for the knee injury on June 6, 2013, based on his treatment of claimant in 2011.

Claimant was also seen by Dr. Koele, claimant's psychiatrist. She reported no significant pain in his right arm at that time. (Ex. II, p.110)

Claimant was later seen at Broadlawns Medical Center in February 2014, at which time he reported no pain in his wrist. (Ex. II, p. 179) In September 2014, he was seen there again and again reported no pain. (Ex. II, p. 209)

However, claimant told Dr. Taylor during an independent medical examination he had constant pain. (Ex. IV, p. 49) Dr. Taylor assigned a rating of eight percent permanent partial impairment for the right upper extremity. (Ex. IV, p. 52)

Thus, Dr. Brehmner rated claimant's impairment for his right upper extremity as two percent of the upper extremity. Dr. Taylor has rated it as eight percent of the upper extremity. Dr. Taylor's examination was a detailed independent medical examination, involving testing and measurement, and citations to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Greater weight will be given to the rating of Dr. Taylor. The employer will pay to claimant scheduled member disability benefits in the amount of eight percent of the right upper extremity, or 20 weeks.

The next issue is the correct rate of compensation for the claimant.

Claimant's submitted rate is based on claimant's statement he does not recall ever not working where he was not paid a rate differential.

The parties stipulated claimant, at the time of this injury, was married and had two exemptions.

The hearing report shows gross earnings of $657.71 per week, and a rate of $446.68. The gross earnings figure is marked as disputed. A handwritten note states, "Defendants' rate calculation is in Defendant's exhibit B, p. 156". "Defendant's exhibit" is crossed out and altered to "claimant's". However, exhibit B does not have 156 pages. Exhibit B has only 1 page, and is listed as "Des Moines Public Schools Disability Plan". The one-page document might be payments under a disability plan. It might be wage records. There is no calculation of rate. All defendant's brief says on this issue is, "The timekeeping records of Des Moines Public Schools are more accurate and objective and should be utilized to calculate the rate in this matter". Claimant's exhibit II does have a page 156. However, that page is part of an IME report, not a rate calculation. Defendant's evidence on this issue is incomprehensible.

Claimant's brief states, "Dubinovic now stipulates to the weekly earnings and rate calculated by the Schools, respectively being $652.11 and $443.15." and cites "(cl. ex. II, p. 156)". Again, page 156 is not a rate calculation or wage report, but a page of an IME.

Claimant's stipulation will be adopted although its source is unclear.

The next issue is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code Section 85.27.

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 claimant has established a stipulated work injury, defendant employer shall pay claimant's medical expenses. Claimant, in his post-hearing brief, stated the medical expenses have been paid by defendant employer.

The next issue is whether defendants are entitled to a credit. Defendants will be given a credit for any weekly benefits previously paid. Defendants state they have paid five weeks of benefits.

The next issue is whether the claimant is entitled to penalty benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Defendants submit claimant was paid temporary total disability and permanent partial disability benefits in a timely manner. In addition, they point out his claim was fairly debatable, in that the medical records show a discrepancy between claimant's reports of no pain to his treating doctors, and his report of constant pain to the examining doctor.

Defendants did act reasonably in paying the lower rating of impairment. It was not unreasonable to withhold paying the higher rating because of the inconsistent reports of pain made by claimant, which did make the obligation to pay the higher amount fairly debatable. Penalty benefits are not appropriate.

Claimant seeks penalty for late payments of benefits based on claimant's calculations of interest under the United States Rule. Claimant attached to the hearing report a list of payments made, the amounts paid, the type of compensation, and the date paid. Claimant argues that under a technical application of the United States Rule, defendants still owe claimant $9,215.02 and applicable interest, as set forth in claimant's post-hearing brief. Defendants fail to offer a contrary calculation, and therefore claimant has shown by a preponderance of the evidence entitlement to the amount claimed, and defendants are ordered to pay it. However, no penalty will be assessed for these payments, as they are "late" only under a hyper-technical rule of interest calculation.

The next issue is whether the Second Injury Fund of Iowa is liable for any part of the claimant's industrial disability.

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).

Claimant filed his petition against the employer for the stipulated injury to his right arm. To be entitled to Second Injury Fund of Iowa benefits, he must show a qualifying first injury. He asserts a prior loss to his right leg on April 15, 2011.

For that injury, claimant stated he developed pain in his right knee in 2011. He first sought medical care for that condition on April 29, 2011. A medial meniscus tear was noted in an MRI on May 12, 2011. Claimant underwent a partial medial meniscectomy on the right knee performed by Steven Aviles, M.D. on June 2, 2011. Claimant was released from care without any work restrictions and was able to do his work. On July 26, 2011, he was found to be at maximum medical improvement on that date, with no permanent restrictions and no permanent impairment. (Ex. III) Claimant had no further treatment for his right knee.

Claimant underwent an independent medical evaluation by Mark Taylor, M.D. He reported constant pain in his right knee. Dr. Taylor assigned a rating of permanent partial impairment of four percent of the right lower extremity for the 2011 knee injury. He imposed a lifting restriction of 50 pounds, standing and walking, using a ladder, bending, kneeling, etc., only occasionally. (Ex. III, pp. 18-27)

However, claimant was able to do his custodial work without any problems, and surveillance video showed him doing such activities as swimming, bending over to water plants, climb in and out of a pool, etc. (Ex. FF, pp. 13-25)

For the second injury, claimant relies on the December 20, 2012, stipulated work injury to his right hand. (Ex. V, p. 147) He was diagnosed with a wrist sprain, but an MRI showed a nondisplaced distal radius fracture. (Ex. IV, p. 2)

He was referred to Dr. Bremner, where he wore a wrist splint and underwent physical therapy. He was returned to work without any restrictions on March 7, 2013. (Ex. IV, p. 30) He was found to be at MMI for the right wrist and not requiring any restrictions on November 5, 2013. (Ex. BB, p. 3) Dr. Bremner later assigned a rating of permanent partial impairment of two percent of the right upper extremity. (Ex. E, p. 3)

Claimant underwent a second IME with Dr. Taylor on January 20, 2015. (Ex. IV, pp. 46-55) Dr. Taylor, at that time, assigned a rating of permanent partial impairment of eight percent of the right upper extremity, with a 50 to 60 pound lifting restriction, and no repetitive work or use of vibratory tools with the right hand. (Ex. IV, p. 53)

It has been determined above that greater weight will be given to the opinion of Dr. Taylor.

Claimant applied for Social Security Disability benefits, but cited only his mental condition, not his knee or hand conditions. (Ex. EE, p. 10)

The Fund argues claimant's first injury, to his right knee, did not leave him "handicapped", nor did he receive any permanent work restrictions from Dr. Aviles, nor any permanent impairment rating from Dr. Aviles. Claimant returned to work and was able to do his normal duties.

However, Dr. Taylor did find permanent impairment in the right knee. He noted the surgery had helped claimant, and that the right knee was stable and did not require further treatment. But, he also assigned a rating of permanent impairment. The Fund submits claimant's disability was caused by his mental illness, not his knee or hand, but Dr. Taylor was aware of claimant's mental problems and still assigned a rating of impairment. It is found claimant has a loss of use of his right leg from his 2011 knee injury. He has established a qualifying first injury. That injury is determined to have resulted in four percent impairment to the right lower extremity, or 8.8 weeks of benefits.

Claimant has also shown a loss of use from his second injury to the right wrist. That has been determined above to be eight percent of the right upper extremity, or 20 weeks of benefits.

Claimant must also show the combined effect of his first and second injuries has produced a total industrial disability in excess of the scheduled member disabilities.

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).

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.

Again, the Fund argues the second injury, the right wrist injury, has not resulted in any loss of use. The Fund points out claimant again returned to work doing full duty work for both his first and second injuries. He suffered no loss of wages. No doctor has stated he cannot work because of these injuries.

But claimant is not required to show he is totally disabled by his injuries. He is not foreclosed from Fund benefits just because another injury, his alleged mental-mental injury, may also cause disability, although only the combined disability from his pled first and second injuries can be considered in this industrial disability analysis. It is sufficient if he has shown both pled injuries combine to produce industrial disability exceeding his scheduled member disabilities.

Claimant has had a good result with both of his pled injuries. He has been able to return to work following these injuries without any alteration or accommodation of his duties. However, he has substantial work restrictions from Dr. Taylor. His ratings of impairment for the first and second injuries are not high, but it is found their combined effect, which takes into consideration other factors such as claimant's age, the work restrictions, claimant's work experience, his education, etc., is 10 percent industrial disability, or 50 weeks of benefits.

Claimant has prior ratings of 4 percent of the right lower extremity, or 8.8 weeks, and 8 percent of the right upper extremity, or 20 weeks of benefits, for which the Fund receives a credit. Claimant's application of the percentages to the body as a whole equivalent is erroneous. Therefore, claimant is awarded benefits from the Second Injury Fund of Iowa for 50 weeks minus 28.8 weeks, or 20.2 weeks of benefits. The Fund's liability will commence at the expiration of the period of time representing the employer's liability to claimant, expected to be July 26, 2013.

ORDER

THEREFORE IT IS ORDERED:

In file 5047783, date of injury December 20, 2012, the injury to claimant's right wrist:

Defendant employer shall pay unto the claimant healing period benefits at the rate of four hundred forty-three and 15/100 dollars ($443.15) per week from December 21, 2012, to March 8, 2013.

Defendant employer shall pay unto the claimant 20 weeks of permanent partial disability benefits at the rate of four hundred forty-three and 15/100 dollars ($443.15) commencing March 9, 2013.

Defendant employer shall pay accrued weekly benefits in a lump sum.

Defendant employer shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant employer shall be given credit for benefits previously paid.

Defendant employer shall pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendant employer shall pay the future medical expenses of the claimant necessitated by the work injury.

Defendant employer shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendant employer.

The Second Injury Fund of Iowa shall pay claimant 20.8 weeks of benefits, at the rate of four hundred forty-three and 15/100 ($443.15), commencing at the expiration of the obligation of the employer to pay permanent partial disability benefits in this file.

In file 5042677, date of injury November 11, 2011, the alleged mental-mental injury:

Claimant takes nothing from this file.

Costs are taxed to claimant.

Signed and filed this 12th day of November, 2015.

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.