BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JANET PARRISH,

Claimant,

vs.

ABCM CORPORATION d/b/a SOUTHFIELD WELLNESS COMMUNITY,

Employer,

and

SAFETY NATIONAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5053102

ARBITRATION DECISION

Head Note Nos.: 1802, 1803, 2501 2907, 4000.2

STATEMENT OF THE CASE

Janet Parrish, claimant, filed a petition for arbitration against ABCM Corporation d/b/a Southfield Wellness Community (hereinafter referred to as "Southfield"), as the employer and Safety National Casualty Corporation as the insurance carrier. An in-person hearing occurred on October 17, 2016.

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 evidentiary record includes claimant's exhibits 1 through 30, and 32-41. The evidentiary record also includes defendants' exhibits A through M. All exhibits were received without objection.

Claimant testified on his own behalf, including offering rebuttal testimony. Defendants called John Boughton to testify.

The evidentiary record closed at the end of the October 17, 2016 hearing. However, counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until November 21, 2016 to serve their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to an award of additional temporary disability benefits between March 6, 2014 and April 21, 2014 at a higher weekly rate than was voluntarily paid by defendants.

2. Whether claimant's injury should be compensated as a scheduled member injury to the left leg or as an unscheduled injury with industrial disability.

3. The extent of claimant's entitlement to permanent disability benefits, including a claim as an odd-lot employee.

4. The proper commencement date for permanent disability benefits.

5. Claimant's applicable gross weekly earnings prior to the March 6, 2014 injury date and the corresponding weekly rate at which benefits should be awarded.

6. Whether claimant is entitled to reimbursement and/or payment of past medical expenses contained at claimant's Exhibits 29, 30, 32, and 38.

7. Whether claimant is entitled to an order for alternate medical care and specifically for future mental health treatment through Lori J. Ohrt, a licensed social worker, and Nicole Ehn, M.D.

8. Whether claimant is entitled to an award of penalty benefits pursuant to Iowa Code section 86.13 for an alleged underpayment of weekly benefits and/or an alleged unreasonable delay or denial of permanent disability benefits.

9. Whether costs should be assessed against either party.

FINDINGS OF FACTS

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

Janet Parrish is a pleasant 54-year-old woman, who presented as a relatively articulate woman at hearing. She appeared to understand all of the proceedings, certainly responded appropriately to all questioning and presented no outward signs of being mentally challenged. Ms. Parrish graduated from high school in 1981 with "C's" and "D's" in school. She attended Iowa Community College, though she did not complete those studies, citing a low grade point average.

Claimant has worked in food service at a nursing home, waitressed at a small family restaurant, as a clerk at a gas station, doing food preparations at a Casey's, and ultimately as a housekeeper at Southfield. She testified she quit some of those jobs because they were too stressful.

Unfortunately, Ms. Parrish has faced numerous hardships and stressful situations throughout her life. She was the primary caregiver for her mother before her mother passed away in the 1980s. Ms. Parrish admits that she took her mother's passing particularly hard and fell into a severe depression after her mother's death. On cross-examination, Ms. Parrish acknowledged that she had suicidal thoughts back in the 1980s and that she attempted suicide once. Ms. Parrish's emotional issues continued throughout the 1990s and 2000s and were admittedly pretty bad at times.

Ms. Parrish was also the victim of a sexual assault by her husband's brother. Ultimately, her husband did not believe her that she had been assaulted. Her marriage deteriorated and ended in divorce after this event. The sexual assault and resulting divorce both caused obvious and understandable anxiety and depressive symptoms for Ms. Parrish.

Her father also fell ill and she provided him care and companionship until his death in 2011. This again affected Ms. Parrish and she required some medication therapy after her father's death. In 2012, Ms. Parrish's brother died, which understandably also increased her stress and anxiety levels.

Ms. Parrish sustained a traumatic injury to her left knee as a result of her work activities at Southfield. On March 6, 2014, Ms. Parrish was working as a housekeeper for Southfield. She was assigned to clean cigarette butts off of an outdoor patio. Unfortunately, when she attempted to perform those duties, she slipped on ice and sustained a significant injury to her left knee.

After her fall, claimant radioed for assistance and was taken to the hospital via ambulance. She was initially transported to the Van Diest Medical Center in Webster City, Iowa. After x-rays of her left knee identified dislocation of the patella and displacement of at least two bone fragments from the patella, Ms. Parrish was transferred to Unity Point Trinity Regional Hospital in Fort Dodge, Iowa. (Exhibit F; Ex. 2) The evaluating emergency room physician in Fort Dodge described claimant's injury as involving "significant swelling of her left knee, obvious deformity." (Ex. 2, page 1) An orthopaedic consultation was ordered.

Prabhudev Prasad Purudappa, M.D. evaluated claimant on the date of injury and diagnosed claimant with a left-sided patellar tendon avulsion and a comminuted fracture of the inferior pole of the left patella. (Ex. 2, p. 7) Dr. Purudappa recommended surgical intervention. Dr. Purudappa performed a left patellar tendon repair on March 6, 2014 and his intra-operative observations confirmed the commuted fracture of the inferior pole of the patella. (Ex. 2, p. 12)

Although a difficult recovery, Ms. Parrish's physical recovery did progress after surgery. In September 2014, Dr. Purudappa sent claimant for a functional capacity evaluation (FCE). The FCE concluded that claimant gave consistent effort and that the testing was valid. (Ex. 7, p. 1) The FCE recommended restrictions that include occasional lifting up to 20 pounds, limitations on walking, crouching, kneeling, stairs, and ladders. (Ex. 7, pp. 9-10)

Dr. Purudappa declared her to be at maximum medical improvement on October 8, 2014. (Ex. 4, p. 29) In January 2015, Dr. Purudappa recommended against any kneeling on the ground over her left knee joint and recommended she perform no squatting. (Ex. 8, p. 1) In August 2016, Dr. Purudappa clarified his work restrictions at the request of claimant's counsel, indicating claimant required the following restrictions as a result of her March 6, 2014 left knee injury:

1. No kneeling on ground over the left knee joint;
2. No squatting;
3. Limited standing for long periods of time;
4. Limit walking to short distances without a cane;
5. Avoid ladders and heights;
6. Limit stairs and use a railing when climbing stairs;
7. Limit lifting occasionally to no more than 50 lbs. due to knee pain;
8. . . . use of a cane while walking; and
9. . . . use of a bar for stabilization and aid while using the toilet and bath.

(Ex. 8, p. 3) Dr. Purudappa assigned a ten percent permanent impairment to claimant's left leg as a result of the March 6, 2014 work injury. (Ex. 8, p. 2)

Claimant sought an independent medical evaluation to evaluate her left knee. Mark C. Taylor, M.D. performed that evaluation on May 13, 2015. (Ex. 15) Dr. Taylor opined that claimant's left knee injury, resulting treatment and ongoing knee symptoms and limitations are directly and causally related to her fall at work on March 6, 2014. (Ex. 15, p. 7) Dr. Taylor concurred with the October 8, 2014 date for maximum medical improvement of claimant's left knee injury. (Ex. 15, p. 7)

As far as restrictions, Dr. Taylor opined that claimant should lift up to 30 pounds only rarely and up to 20 pounds only occasionally with all lifting preferably at or above knee level. He opined that claimant should alternate sitting, standing and walking as needed for comfort. Dr. Taylor also opined that claimant can bend occasionally, but should avoid squatting, crawling, kneeling on the left knee, and climbing ladders. Finally, Dr. Taylor opined that claimant should climb stairs only rarely and with the assistance of a handrail. (Ex. 15, p. 8) With respect to permanent impairment, Dr. Taylor disagreed slightly with Dr. Purudappa. Dr. Taylor opined that claimant sustained a 12 percent permanent impairment of the left leg as a result of the March 6, 2014 work injury. (Ex. 15, p. 8)

The restrictions imposed by either Dr. Purudappa or by Dr. Taylor for claimant's left knee would not render claimant unable to perform gainful employment. Claimant's vocational expert admits this fact. (Ex. 18, p. 111)

After surgery, claimant was released by Dr. Purudappa to return to light duty work. The employer accommodated claimant's restrictions, including providing her transportation to and from work during her period of light duty. (Claimant's testimony) The parties stipulated to the inclusive dates of claimant's entitlement to healing period benefits. (Hearing Report) In his December 19, 2014 office note, Dr. Purudappa notes that claimant is back to full-time work, but notes that she has increased pain in her left knee joint by the end of the work day. (Ex. 4, p. 30)

Ms. Parrish testified that she returned to work and essentially performed the full spectrum of her work duties. However, she testified to specific job duties that she had difficulty performing. Claimant testified that she felt as though the employer pushed her to perform work beyond her physical restrictions and abilities. Eventually, claimant decided that she was not capable of physically continuing in her position as a housekeeper with Southfield. On January 13, 2015, Ms. Parrish voluntarily resigned her employment with Southfield. (Ex. 26)

Claimant asserts that she also developed depression as a result of the left knee injury, or at the very least, that the left knee injury caused a material aggravation of a pre-existing mental health condition. Defendants contend that claimant had extensive pre-existing mental health treatment and diagnoses and that any ongoing mental health issues are not causally related to nor materially aggravated by the March 6, 2014 left knee injury.

Ms. Parrish concedes that all of these events were stressful and caused her depression and/or anxiety. However, she testified that her current symptoms, as will be discussed below, are different than before her work injury. She testified that she was capable of coping and continuing her social events and work prior to the date of injury but is no longer capable of such things. She testified that her sleep is now disrupted as a result of her fall at work.

In support of her claim, Ms. Parrish puts forth the opinions of her treating family physician, Nicole Ehn, M.D. Claimant also submitted a report from Dan L. Rogers, Ph.D., a fellowship trained and licensed clinical psychologist. In addition, claimant submitted a report from her mental health counselor, Lori J. Ohrt. Finally, claimant asked Dr. Taylor to comment on the mental health issue as part of his independent medical evaluation.

Dr. Ehn is claimant's personal physician. Dr. Ehn prescribed claimant medications for depression prior to the date of injury and ultimately referred claimant for mental health counseling after the March 6, 2014 injury. Dr. Ehn authored a report dated January 27, 2015 in which she opined, "[i]t is more likely than not that Ms. Parrish's knee injury contributed to her underlying depression." Dr. Ehn further opined that "Ms. Parrish did have depression prior to her injury on March 6, 2014 and her knee injury aggravated her underlying depression significantly." (Ex. 10, p. 1)

Dr. Ehn has an advantage over other physicians and medical specialists of having seen and treated claimant both before and after the left knee injury. Dr. Ehn was prescribing medications for claimant's depression before the date of injury and ultimately deemed it necessary to refer claimant for counseling after the left knee injury. Dr. Ehn's perspective and opinions, therefore, carry significant weight in this situation. On the other hand, Dr. Ehn is not a mental health professional. She is a primary care physician. Many of the other professionals offering opinions have superior training and credentials in the mental health field.

Claimant obtained an independent evaluation performed by Dr. Rogers on February 5, 2016. Dr. Rogers opined, "It is likely that in the past she had sufficient psychological resources to cope adequately with the demand place [*sic*] on her; of late, however, her coping capacity has been exceeded. As a result she is experiencing some intensely negative, painful emotions that cause considerable dysphoria. This leads her to be depressed now and susceptible to greater depression in the future." (Ex. 16, p. 6) Dr. Rogers diagnoses claimant with adjustment reaction with depression and anxiety, dysthymic disorder, chronic pain syndrome due to a medical condition, and mental retardation. (Ex. 16, p. 7)

Dr. Rogers is critical of the methodology and credentials of a defense evaluator, Amy Mooney, Ph.D. Dr. Rogers asserts that claimant's mental retardation makes it inappropriate for Dr. Mooney to have administered an MMPI test. Dr. Rogers administered a different test and asserts that the allegedly faulty testing performed by Dr. Mooney results in significant flaws within the opinions of Dr. Mooney and Dr. Augspurger. Ultimately, Dr. Rogers opines that "pain causes fatigue which leads to or causes depression. Also, the same neurotransmitters are involved in both pain and depression. In addition, disabling injury associated with pain lead to loss of function and damage to body image, which both result in depression." (Ex. 16, p. 12)

Dr. Rogers is a licensed clinical psychologist with approximately 30 years of experience in private practice. Dr. Rogers has also served as an assistant professor of psychology at more than one medical facility and as the chairman of the Iowa State Board of Psychology Examiners. Dr. Rogers carries excellent credentials and experience. His opinions must also be given significant weight and consideration. On the other hand, it appears that Dr. Rogers did not review claimant's medical history and prior medical records.

The only medical record reviewed by Dr. Rogers was the evaluation and report offered by Dr. Mooney and Dr. Augspurger. All other records reviewed by Dr. Rogers were educational records. (Ex. 16, p. 1) Therefore, Dr. Rogers' understanding of the history of this case and prior care relies almost exclusively upon the history provided by claimant, whom he deems to be mentally retarded. It seems, under the circumstances, to be odd that Dr. Rogers would not want to see many of the prior medical records given his concerns about claimant's mental capacities.

Ms. Ohrt appears to be a licensed social worker. Ms. Ohrt is the mental health provider that has had the most interaction with claimant and has provided her

counseling services for an extended period of time. Therefore, Ms. Ohrt's observations and opinions must also be given significant consideration.

Ms. Ohrt opines that "[t]his injury has put [claimant] into a depression." (Ex. 14, p. 2) Ms. Ohrt's treatment records commence on July 22, 2014. In that office note, Ms. Ohrt documents claimant's left knee surgery and indicates claimant "is depressed it is not getting better faster and her work is pushing her to do more than the dr [*sic*] has released her to do." (Ex. 13, p. 1) Ms. Ohrt diagnosed claimant with depression due to general medical condition. (Ex. 13, p. 2)

Interestingly, when documenting claimant's past medical history at her initial evaluation, Ms. Ohrt simply notes that the past medical history "Will be completed after next session." (Ex. 13, p. 1) Review of Ms. Ohrt's subsequent records does not disclose any significant discussions of claimant's past medical history. (Ex. 13) It is unknown whether Ms. Ohrt is fully aware of claimant's history of depression, ongoing medication usage for depression prior to the March 6, 2014 injury date, or some of the other stressors that occurred in claimant's personal life before March 2014.

Another very interesting factual observation provided by Ms. Ohrt is her assessment that "Estimated intelligence is normal." (Ex. 13, p. 2) Ms. Ohrt concluded based on her observations that claimant had unimpaired memory, no impairment of abstract reasoning, and no impairment of her judgment even after being diagnosed with depression. (Ex. 13, p. 2) Ms. Ohrt certainly makes no mention of suspecting claimant to be an intellectually low functioning, or mentally retarded, individual. (Ex. 13) Ms. Ohrt's findings and observations in this regard are directly contrary to those of Dr. Rogers.

Claimant graduated from high school. She attended some college courses. She testified that she received some assistance during high school in her testing. However, she was able to obtain passing grades in both high school and some initial college courses. While Ms. Parrish may have a below normal cognitive ability level, she does not present as intellectually challenged and certainly has demonstrated some abilities in the classroom setting as well as the ability to learn and complete functions within the employment setting.

Based upon claimant's abilities to complete various medical and psychological histories, her ability to complete written testing, the observations of Ms. Ohrt, Dr. Mooney and Dr. Augspurger, and my own observations of claimant at trial, I find the observations of Ms. Ohrt, Dr. Mooney and Dr. Augspurger to be most accurate as to claimant's level of cognitive functional abilities. I find Dr. Rogers' assessment of mental retardation to be inaccurate with respect to claimant's cognitive functional abilities.

Dr. Taylor is an occupational medicine physician and clearly does not specialize in mental health treatment, diagnosis, or care. Dr. Taylor also specifically notes that he is "not a mental health professional" and that he would defer to such specialists. (Ex. 15, p. 7) Nevertheless, Dr. Taylor comments on claimant's mental health claim, noting "[i]t appears that her depression was exacerbated and/or aggravated based on

the fact that she required counseling and based on the opinion of Dr. Ehn." (Ex. 15, p. 7)

Defendants rely upon the opinions of a board certified psychiatrist, Terrence Lee Augspurger, M.D., as well as Amy Mooney, Ph.D. Dr. Augspurger is a board certified psychiatrist, who has served as a clinical instructor in psychiatry at the University of Iowa Hospitals and Clinics and has been in private practice for nearly 40 years. Dr. Augspurger has been a distinguished fellow in the American Psychiatric Association since 1996, has served as the president of the Iowa Psychiatric Society. (Ex. E)

Dr. Mooney is a licensed mental health counselor in the State of Iowa. Dr. Mooney has a doctoral degree in counseling psychology. She has served as an assistant professor of counseling psychology at Liberty University since 2008.

Dr. Mooney performed an interview and relevant testing on January 25, 2016. Dr. Augspurger also interviewed claimant on January 25, 2016. Dr. Mooney and Dr. Augspurger both reviewed claimant's past medical records. Dr. Augspurger and Dr. Mooney issued a joint report dated February 5, 2016.

Dr. Augspurger and Dr. Mooney diagnosed claimant with major depressive disorder, recurrent, moderate, with anxious distress. They also diagnosed claimant with "[o]ther specified anxiety disorder with generalized panic, and residual posttraumatic features." (Ex. C, p. 8) Dr. Augspurger and Dr. Mooney were asked to address causation of claimant's mental health diagnoses. They opined, "Ms. Parrish's depressive symptoms clearly show a preceding depression prior to the injury of 2015 as evidenced by Ms. Parrish's self-report and medical records." (Ex. C, p. 8)

Drs. Augspurger and Mooney reviewed certain medical literature findings and ultimately concluded, "[t]o provide any conclusion's [*sic*] that Ms. Parrish's diagnosis of Major Depressive Disorder is a result of injury is not supported by research literature or expert opinion. Her mental disorders are pre-existing. It cannot be said with reasonable medical certainty that they have been materially aggravated by the injury." (Ex. C, p. 8)

Dr. Augspurger and Dr. Mooney only evaluated claimant one time. They did obtain relevant psychological testing. However, they did not have the advantage of evaluating claimant before and after the March 6, 2014 injury date. Nor did Dr. Mooney and Dr. Augspurger have the advantage of evaluating Ms. Parrish multiple times over a period of time. On the other hand, they did have voluminous medical records made available to them to review and upon which they could formulate their opinions. They clearly had more medical records to formulate the medical history than were available to or reviewed by Dr. Rogers.

Although Dr. Rogers was critical of Dr. Mooney's credentials, I find that she was qualified as a consulting psychologist at the doctorate level to administer the relevant psychological tests performed on Ms. Parrish. (Ex. C, p. 11; Ex. C, p. 12) I find that Dr. Augspurger's qualifications and credentials as a board certified psychiatrist, who has practiced psychiatry for almost 40 years are superior to any of the other medical professionals providing opinions on mental health issues in this case.

There is a clear difference of opinion between Dr. Rogers and Dr. Augspurger as to claimant's level of cognitive functioning. Given the observations of Ms. Ohrt, as well as the educational history information, and my observations of the claimant at hearing, I accept Dr. Augspurger's opinion that Ms. Parrish is not mentally retarded. I concur with Dr. Augspurger that claimant's life achievements, including graduating from high school, attending college and passing her classes, as well as working independently in competitive labor market jobs throughout her work life, do not represent someone with a 60 full scale IQ at the mentally retarded functioning level. (Ex. C, p. 11)

Even more importantly, Dr. Mooney explained that the results of one of the written tests administered, the Pain Patient Profile P-3, requires an 8th grade reading level. Dr. Mooney explained that claimant completed that test and the validity results within that test returned a valid finding. As Dr. Mooney explained, claimant was capable of reading and comprehending the test, demonstrating an 8th grade reading level. (Ex. C, p 13) Dr. Mooney's statement in this regard is accepted as accurate and demonstrates claimant exceeds the cognitive functional levels assumed by Dr. Rogers.

As noted above, I recognize the evidence in this record could be viewed differently. I acknowledge and recognize that each of the experts in this case has strengths and weakness in their opinions, history, and/or credentials. Ultimately, having weighed all of the competing medical opinions, the explanations supporting those opinions, as well as the competing qualifications, experience, and expertise of each of the medical professionals, I find the qualifications and opinions offered by Dr. Augspurger (and simultaneously by Dr. Mooney) to be most convincing in this record. Ultimately, I find that the board certified psychiatrist (Dr. Augspurger), along with the doctorate level psychologist (Dr. Mooney) offer opinions based upon medical research and published medical literature.

Having made this finding, I accept the opinions of Dr. Augspurger and Dr. Mooney as most convincing. Therefore, I find that claimant has not proven by a preponderance of the evidence that her March 6, 2014 left knee injury, or resulting symptoms, was a substantial causative factor in the development of her subsequent depression and anxiety. Similarly, I find that claimant did not prove by a preponderance of the evidence that the March 6, 2014 left knee injury, or resulting symptoms, materially aggravated, accelerated, worsened, or lit up claimant's underlying and pre-existing depression and/or anxiety.

The parties submitted a dispute about the extent of claimant's entitlement to permanent disability. Having reached the findings above about the mental injury claim, I focus the remainder of the analysis on the extent of permanent disability on the claimant's left knee.

As noted above, Dr. Purudappa opined that claimant sustained a ten percent permanent impairment of the left lower extremity as a result of the March 6, 2014 work injury. Dr. Purudappa clearly utilized the AMA Guides and completed Figure 17-10 to calculate the applicable impairment rating. Reviewing Dr. Purudappa's impairment rating, it is clear that he utilized a range of motion method and found an abnormal range of motion pertaining to claimant's extension of the left knee. Pursuant to Table 17-10 of

the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, p. 537, the ten percent permanent impairment rating of the lower extremity is appropriate based on Dr. Purudappa's range of motion measurements.

Dr. Taylor also clearly relied upon the AMA Guides, Fifth Edition, in rendering his permanent impairment rating. Unlike Dr. Purudappa's range of motion findings and impairment rating, Dr. Taylor utilized a diagnosis based estimate to determine the permanent impairment rating. Table 17-33 on page 546 of the AMA Guides, Fifth Edition, provides for a 12 percent permanent impairment rating for a patellar fracture when the articular surface is displaced more than 3 millimeters. Dr. Taylor's impairment rating is clearly also justifiable under the AMA Guides, Fifth Edition.

Given that both physicians' impairment ratings can be understood and justified under differing portions of the AMA Guides, it is necessary to determine which rating the AMA Guides instructs be utilized under the facts of this particular case. Section 17.2j of the AMA Guides, Fifth Edition provides on page 545 that "[s]ome impairment estimates are assigned more appropriate on the basis of a diagnosis than on the basis of findings on physical examination." In this instance, the AMA Guides provide an impairment rating based upon a specific diagnosis of a patellar fracture. Dr. Taylor's impairment rating is based upon this specific diagnosis. Dr. Purudappa's impairment rating is based on physical examination findings of range of motion.

The above quoted section of the AMA Guides suggests that Dr. Taylor's methodology of rating claimant's impairment is more appropriate under the circumstances of this case. Moreover, "[i]f more than one method can be used, the method that provides the higher rating should be adopted." AMA Guides, Fifth Edition, p. 527. In this instance, the impairment rating offered by Dr. Taylor is specific to the type of injury sustained by claimant and provides the higher impairment rating. Although either physician's rating can be justified under the AMA Guides, Dr. Taylor's permanent impairment rating is most consistent with the specific directions outlined in Chapter 17 of the AMA Guides, Fifth Edition.

Therefore, I find that claimant has proven by a preponderance of the evidence that she sustained a permanent impairment equivalent to 12 percent of the left leg. The permanent impairment rating appears consistent with the medical evidence, medical restrictions, and lay testimony about claimant's condition such that I find claimant has proven she sustained a 12 percent permanent disability of the left leg.

Ms. Parrish seeks an award of past medical expenses contained in Exhibits 29, 30, 32 and 38. Defendants concede the requested medical expenses were reasonable and medically necessary. (Hearing Report) However, defendants dispute whether the requested medical expenses are causally related to the March 6, 2014 work injury. (Hearing Report)

Review of Exhibit 29 demonstrates charges for prescriptions for Oxycontin on March 6, 2014 totaling $54.99, a charge for oxycodone-acetaminophen on March 22, 2014 totaling $41.99, and charges for tramadol on July 2, 2014 totaling $3.40. These medications are known to be used for pain. These medications are clearly related to

the treatment of claimant's fractured patella and causally related to the March 6, 2014 work injury. The remainder of the medications and charges contained and summarized in Exhibit 29 have not been proven to be causally related to the March 6, 2014 work injury.

Exhibit 30 contains a statement for a cane totaling $23.00. Claimant was prescribed a cane by Dr. Purudappa. The cane is clearly related to claimant's patellar fracture and the March 6, 2014 work injury.

Exhibit 32 reflects charges for psychotherapy performed by Lori Ohrt. Having found that claimant did not prove by a preponderance of the evidence that the mental injury claims are compensable, I similarly find that the charges contained in Exhibit 32 are not causally related to the March 6, 2014 work injury.

Exhibit 38 includes an itemization of medical mileage for various appointments claimant attended. Dr. Purudappa was an authorized physician in this case. His treatment was clearly related to the March 6, 2014 work injury. Claimant is clearly entitled to transportation expenses related to travel to and from Dr. Purudappa's office. Therefore, I find that the mileage reimbursement totaling $28.75 sought for March 16, 2016 to attend an appointment with Dr. Purudappa and the mileage reimbursement totaling $28.75 sought for June 6, 2016 to attend another appointment with Dr. Purudappa are clearly related to the March 6, 2014 work injury. All remaining medical mileage outlined or summarized in Exhibit 38 is for mental health counseling with Dr. Ohrt and is found not related to the March 6, 2014 work injury.

The parties also submit claimant's gross average weekly wages as a disputed issue for determination. The parties appear to concur that the payroll records contained at Exhibit 28 are accurate. The dispute between the parties appears to be determination of which weeks of wages are representative of claimant's typical earnings prior to the date of injury.

Defendants urge that the 14 weeks immediately preceding the date of injury be utilized. (Ex. J, p. 1) Wages during that period of time range from $603.92 on pay period ending February 28, 2014 to $855.14 on pay period ending December 31, 2013. Claimant contends that the earnings for pay period ending February 28, 2014 are "short" and should not be considered to be representative or typical of claimants' pre-injury earnings. (Ex. 27, p. 2)

Claimant also argues that earnings for pay periods ending December 15, 2013 ($669.90); November 30, 2013 ($609.00); November 15, 2013 ($672.44); October 15, 2013 ($659.19); and September 30, 2013 ($597.00) are also "short" and not representative of his typical earnings. Essentially, claimant urges that 14 weeks of earnings be considered, but he urges that 12 weeks of earnings be disregarded as not typical. Those 12 weeks of earnings appear quite consistent and similar to the undersigned, however.

Interestingly, claimant is willing to include some pay periods that include what appear to have higher earnings. For instance, claimant seeks to include earnings from December 31, 2013 in which claimant's earnings were $855.14 and earnings for week

ending October 31, 2013 in which claimant earned $893.20. No specific explanation was provided why claimant's earnings fluctuated and no specific explanation was offered why claimant's earnings were higher or lower on any specific weeks.

I find that it would be unreasonable and strange to exclude 12 weeks of earnings to get 14 weeks of "typical" earnings under this set of facts. Therefore, I find that the 14 weeks immediately preceding claimant's date of injury are as representative and typical as any other weeks. I concur with defendants' calculations of the weekly rate located at Exhibit J, page 1. I specifically find that claimant's gross average weekly wages prior to the March 6, 2014 injury date were $353.28.

Defendants assert that the applicable weekly rate should be $230.89. However, they paid voluntary weekly benefits in this case at the weekly rate of $228.00. Defendants offered no explanation for this discrepancy and offered no evidence that they provided claimant notice of their intention to pay at the lower weekly rate. Claimant has proven a delay or denial of benefits in the amount of $2.89 per week for all benefits paid to date. Defendants have not proven a reasonable basis or excuse for the underpayment of benefits or that they contemporaneously conveyed their basis for payment at the lower rate.

Claimant asserts that defendants also unreasonably delayed obtaining a permanent impairment rating for claimant's left knee such that they unreasonably delayed payment of permanent disability benefits. Claimant finally urges that defendants did not have a reasonable basis for denial of her mental injury claim.

CONCLUSIONS OF LAW

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 categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. 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). Compensation for scheduled injuries is not related to earning capacity. 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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

A mental injury that develops as a result of or is materially aggravated by a physical injury is compensable and converts an injury from a scheduled injury to an industrial injury. Cedar Rapids Community School Dist. v. Pease, 807 N.W.2d 839 (Iowa 2011). However, in this case, I found that claimant did not prove she sustained a mental injury as a result of the March 6, 2014 left knee injury at work. Similarly, I found that claimant did not prove by a preponderance of the evidence that the March 6, 2014 left knee injury caused a material aggravation, acceleration, worsening or lighting up of claimant's pre-existing and underlying mental health. Therefore, I conclude that claimant failed to establish defendants' liability for any mental health claims.

Claimant has established an admitted left knee injury as a result of her fall on March 6, 2014 at work. However, she has not established a mental injury. Claimant's proven injury is limited to the left leg. Therefore, her claim is compensated as a scheduled member injury pursuant to Iowa Code section 85.34(2)(o).

Claimant asserts she has an odd-lot claim. However, her injury is limited to her left knee and her vocational expert conceded that she is not totally disabled when only the physical restrictions are considered. Claimant has not produced evidence sufficient to generate a prima facie case of an odd-lot claim. Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). Therefore, I conclude that claimant cannot legally establish an odd-lot employee status or claim and has not even met the prima facie case for an odd lot claim under the facts of this case. Id. Instead, this case is evaluated solely as a scheduled member injury to 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 her left leg. Iowa Code section 85.34(2)(v); Floyd v. Quaker Oats, 646 N.W.2d 105, 109 (Iowa 2002); Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

Having found that claimant proved a 12 percent permanent disability of the left leg as a result of her work injury on March 6, 2014, I conclude that claimant is entitled to an award equivalent to 12 percent of the left leg. Twelve percent (12%) of 220 weeks equals 26.4 weeks. Claimant is, therefore, entitled to an award of 26.4 weeks of permanent partial disability benefits against the employer. Iowa Code section 85.34(2)(o), (v).

The parties dispute the proper commencement date for permanent partial disability benefits. Permanent partial disability benefits commence upon the termination of the healing period. Iowa Code section 85.34(1). As the Iowa Supreme Court explained, the healing period terminates and permanent partial disability benefits commence at the earliest of claimant's return to work, medical ability to return to substantially similar employment, or the point at which the claimant achieves maximum medical improvement. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 374 (Iowa 2016).

In this case, the parties stipulate that claimant's healing period entitlement terminated on April 21, 2014. (Hearing Report) At hearing, the parties agreed that the dates asserted for healing period on the hearing report are accurate and the only remaining claim for healing period asserted by claimant was for underpayment of weekly rate. (Transcript) Therefore, the parties represent to this agency that the healing period terminated on April 21, 2014. As noted above, permanent partial disability benefits commence upon the termination of the healing period. Therefore, permanent partial disability benefits commenced on April 22, 2014. Iowa Code section 85.34(1).

Claimant seeks an award of past medical expenses. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co.,

Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Defendants challenge claimant's request for past medical expenses related to any mental health claims or treatment. Having found that the alleged mental health treatment is not causally related to the work injury on March 6, 2014, I conclude that claimant has not established entitlement to past medical expenses for mental health treatment.

However, I found claimant incurred medication changes totaling $100.38, which were causally related to the work injury. (Ex. 29) Defendants are responsible for these charges.

Having found that claimant purchased a cane for $23.00, which was causally related to the work injury, defendants are responsible for this charge. Finally, I found that claimant traveled for appointments with Dr. Purudappa, which were related to the work injury. Having found claimant established travel expenses totaling $57.50 for these medical evaluations, I conclude defendants are responsible to reimburse claimant $57.50 for this medical mileage. Iowa Code section 85.27; 876 IAC 8.1(2).

Claimant also seeks an award of alternate medical care. (Hearing Report) Claimant did not specifically urge or argue this issue in her post-hearing brief. However, at trial, claimant's counsel urged an award of alternate medical care for future treatment of claimant's depression. An award of alternate medical care can only be made after the alleged condition is found to be compensable. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197 (Iowa 2003). Having found that claimant failed to prove her depression or mental injury is compensable, I conclude that claimant is not entitled to future medical care for the alleged mental injury. Iowa Code section 85.27.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13 for an alleged unreasonable underpayment of weekly healing period and permanent disability benefits. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).
>
> (4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application

of wrong wage base; in absence of excuse, commissioner required to apply penalty).

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

Id.

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

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

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

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

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

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

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

Claimant contends initially that defendants unreasonably delayed their investigation of claimant's mental injury claim. Indeed, claimant may have a valid point that the investigation of the mental injury was delayed and defendants did not have a

basis for denial of the mental injury claim until receipt of the report from Dr. Mooney and Dr. Augspurger. However, having found in defendants' favor on the mental injury claim, no weekly benefits are awarded for the mental injury. Therefore, there are no benefits awarded for the mental injury claim that could be penalized. No penalty is appropriate for defendants' delay in investigating the mental injury because no benefits are owed for that claim.

Claimant next asserts that a penalty should be imposed on defendants for delay in securing a permanent impairment rating for claimant's left knee, which delayed payment of claimant's permanent disability for the left knee. It appears that defendants were compliant with the recommendations made by Dr. Purudappa. He requested a functional capacity evaluation before providing a final impairment and restrictions. The FCE occurred on September 26, 2014. Dr. Purudappa re-evaluated claimant in October and December but did not provide an impairment rating until January 11, 2015. Defendants made a lump sum payment for the benefits they calculated were past due upon receipt of that rating and issued a check by February 11, 2015. I do not find a significant or unreasonable delay occurred in obtaining the treatment, impairment rating, or payment of the impairment rating. Claimant has not established entitlement to penalty benefits for payment of the left knee impairment rating.

Finally claimant asserts that defendants underpaid the weekly rate and should be penalized for this underpayment. In this case, claimant clearly demonstrated (and defendants ultimately stipulated they owed more than was voluntarily paid) an underpayment of the weekly rate. As such, claimant clearly demonstrated a delay in payment of benefits. Once that delay was established, it became defendants' burden to establish that they had a reasonable basis for the delay and that they contemporaneously conveyed their basis for delay to claimant. Iowa Code section 86.13(4).

I found that defendants did not offer a reasonable excuse for the underpayment of benefits and ultimately urged the higher weekly rate awarded. Iowa Code section 86.13(4)(b)(2). Defendants did not contemporaneously convey any bases for their denial or delay of benefits. Iowa Code section 86.13(4)(c)(3). Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

Defendants provided a calculation of the underpayment at Exhibit J, page 2. Defendants concede that they underpaid the weekly rate for temporary total disability benefits by a total of $18.99. The parties also stipulated that defendants paid 22 weeks of permanent disability benefits at the rate of $228.00. This represents an additional underpayment of $2.89 per week for 22 weeks, or $63.58. Therefore, defendants unreasonably delayed or denied benefits via an underpayment of the weekly rate for a total denial of $82.57. Defendants are subject to a penalty on this amount.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission

is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). In this case, defendants stipulate that claimant is entitled to a higher weekly rate than was voluntarily paid by defendants. On the other hand, the underpayment of the weekly rate was relatively minor.

I conclude that a penalty less than 50 percent is appropriate in this situation. Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $25.00 is appropriate in this case.

Finally, claimant seeks assessment of her costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant prevailed on a permanent disability issue and obtained an award of some past medical expenses, I determine that claimant's filing fee of $100.00 shall be assessed pursuant to 876 IAC 4.33(7).

Claimant also seeks assessment of a vocational expert's fee totaling $2,585.20, Dr. Rogers' psychological evaluation and report totaling $2,540.00, as well as a report fee from Dr. Ehn related to the psychiatric issues in this claim. Claimant has not prevailed on the psychiatric issues and her vocational report was rendered meaningless since the case was evaluated as a scheduled injury. Therefore, exercising the agency's discretion, I determine that these disputed costs should be denied.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant for the underpayment of healing period benefits such that all healing period benefits are paid at the weekly rate of two hundred thirty and 89/100 dollars ($230.89).

Defendants shall pay claimant twenty-six point four (26.4) weeks of permanent partial disability benefits commencing on April 22, 2014 at the weekly rate of two hundred thirty and 89/100 dollars ($230.89).

Defendants shall pay all accrued weekly benefits in lump sum with interest pursuant to Iowa Code section 85.30.

Defendants shall receive the credit to which the parties stipulated on the hearing report.

Defendants shall reimburse, pay directly to medical providers if unpaid, or otherwise hold claimant harmless for the medical expenses found to be related in the body of this decision totaling one hundred twenty-three and 38/100 dollars ($123.38).

Defendants shall reimburse claimant's medical mileage totaling fifty-seven and 50/100 dollars ($57.50).

Defendants shall pay claimant penalty benefits totaling twenty-five and 00/100 dollars ($25.00).

Defendants shall reimburse claimant's filing fee totaling one hundred and 00/100 dollars ($100.00) as a cost pursuant to 876 IAC 4.33.

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 9th day of February, 2017.

William H. Grell

WILLIAM H. GRELL
DEPUTY WORKERS'
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WHG/srs

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.