

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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DAVID L. WEBER,

**FILED**

Claimant,

AUG 16 2016

File No. 5050692

vs.

WORKERS COMPENSATION

ARBITRATION

SECOND INJURY FUND OF IOWA,

DECISION

Defendant.

Head Note Nos.: 3200, 3202, 3303

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STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, David L. Weber, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on July 31, 2014 against the employer, Sioux City Foundry Co. Claimant alleged he sustained a work-related injury on December 11, 2013. (Original notice and petition.)

On December 16, 2014, claimant filed an amended petition to include the Second Injury Fund of Iowa as a named party-defendant. The Fund was not served until mid-February 2015. The Fund filed its answer on April 15, 2015. The Fund denied any liability for benefits owed to claimant.

The hearing administrator scheduled the case for hearing on August 12, 2015 at 8:00 a.m. The hearing took place in Sioux City, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Teri Lea Autry as the certified shorthand reporter. She is the official custodian of the records and notes.

For ease and understanding of this case, claimant also filed suit against his former employer, Sioux City Foundry Co. The matter was settled via a full commutation of benefits pursuant to rule 876 IAC 6.2. According to the terms of the commutation, claimant was paid 88 weeks of permanency benefits for the left knee at the weekly benefit rate of \$538.71. The total value of permanency benefits paid equaled \$68,185.29 paid by the employer to the claimant for his left leg injury on December 11, 2013. Claimant was also paid:

\$293.19 for accrued interest;

\$1,755.21 for the independent medical examination (IME) with Dr. Bansal;

\$113.61 for medical mileage;

\$127.71 for costs;

\$6,717.26 for a Medicare Set Aside to cover future medical care; and

\$3,422.01 for additional consideration.

Claimant testified on his own behalf. Mr. Richard Ostrander, Vocational Expert, testified for claimant. Claimant also called Mr. Roger L. Harris, lead maintenance person at the Sioux City Foundry. Defendant elected not to call any witnesses.

The parties offered exhibits. Claimant offered exhibits marked 1 through 35. The Second Injury Fund of Iowa offered exhibits marked A through E. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on November 10, 2015. The case was deemed fully submitted on that date.

### STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on December 11, 2013 to his left lower leg which arose out of and in the course of his employment;
3. Temporary benefits are not in dispute;
4. The parties agree if claimant is entitled to benefits from The Fund, the benefits would commence on March 6, 2015;
5. Defendant has waived all affirmative defenses it may have had available;
6. The Fund is entitled to a credit for all permanency benefits paid by Sioux City Foundry; and
7. The parties agree certain costs that are detailed were paid by claimant and are not in dispute.

### ISSUES

The issues presented are:

1. Is claimant entitled to benefits pursuant to the Second Injury Compensation Act pursuant to Iowa Code section 85.63?

2. If claimant is entitled to benefits pursuant to the Second Injury Compensation Act, to what extent is claimant owed benefits?
3. What is the correct weekly benefit rate, in the event claimant is paid benefits pursuant to the Second Injury Compensation Act? Claimant alleges the weekly benefit rate is \$536.99 per week. The Fund argues the weekly benefits rate is \$530.70 per week.
4. If claimant is entitled to benefits pursuant to the Second Injury Compensation Act, to what credit is the Fund entitled? and;
5. To whom shall costs be taxed?

#### FINDINGS OF FACT

This deputy, after listening to the testimony of claimant at hearing, after listening to the testimony of the other two witnesses, after judging the credibility of all who testified, and after reading the evidence, and the post-hearing briefs makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 63 years old and married. They have been married for approximately 9 years. Claimant stands 5 feet and 8 inches in height; he is considered obese by certain health standards. Claimant resides in Sergeant Bluff, Iowa. The town has approximately 3,200 residents and is now considered a suburb of Sioux City.

Claimant spent his entire educational experience in special education. He worked the final two years of high school as a dishwasher but the work counted toward his high school diploma. Claimant reads on a first grade level. Claimant's math skills are at the 5<sup>th</sup> grade, 7<sup>th</sup> month level. (Exhibit 15, page 4) He is virtually illiterate. He cannot read newspapers, magazines, manuals, or handbooks. He is able to read numbers and percentages.

Claimant does hold an Iowa license to drive a motor vehicle but someone had to read the written test to him in order for him to pass the examination. His license is not restricted. He can read some traffic signs and symbols. Claimant testified he drives a Ford 150 pick-up truck. He is able to get in and out of the truck without assistance. He is also able to pull a camper with his truck for recreational purposes.

Claimant commenced employment with the foundry on August 11, 1995. He testified he has a license to drive a forklift truck but he was given the answers to the questions in order to pass the written test. Claimant stated he learns by watching others. Mr. Harris, the lead worker for maintenance, described claimant as "a good

hands-on learner.” (Transcript, page 64) Claimant testified members of management at the foundry knew claimant could not read and write. (Tr. p. 86)

If claimant is shown how to do something, then he is able to follow suit. Claimant relies on his spouse to handle written matters at home. He is unable to use a checkbook. He pays his bills with cash.

At the time of claimant’s December 11, 2013 work injury at Sioux City Foundry, he was also an employee at a Hy-Vee Grocery Store. Claimant had been working as a part-time stocker in the frozen dairy products department since August 9, 1996. After his injury, claimant “voluntarily quit” his job at Hy-Vee.

Claimant has a prior medical history involving other work injuries at the foundry. Claimant underwent back surgery in 1996. The injury occurred while claimant was working at the foundry. Apparently, a co-worker fell on claimant while he was working on a piece of equipment. Subsequent to the surgery and appropriate rehabilitation, claimant returned to his full duty position.

On March 24, 2007, claimant was removing a gear box when he strained his back. Apparently, claimant was jerked backwards. Initially, claimant was seen at Mercy Business Health Services, in Sioux City, Iowa. Rodney Cassens, M.D., diagnosed claimant with: “Left lumbar paraspinal muscular strain with left lower extremity radicular pain.” (Ex. 14, p. 7)

On July 17, 2007, claimant underwent a left L5-S1 microsurgical discectomy redo for a recurrent L5-S1 disc herniation. His prior surgical procedure on the spine had occurred in 1996. (Ex. 14, p. 9)

On October 2, 2007, claimant participated in a functional capacity evaluation (FCE) at Community Physical Therapy & Sports Medicine in Valley, Nebraska. Adam J. Oldehoeft, P.T. conducted the examination and provided work restrictions based upon the valid FCE. The restrictions for the back are contained in Exhibit 14, page 10 and duplicated below:

**MATERIAL HANDLING ABILITY:**

| <u>Work Activity</u> | <u>Infrequent</u> | <u>Occasional</u> | <u>Frequent</u> | <u>Constant</u> |
|----------------------|-------------------|-------------------|-----------------|-----------------|
| Barrier Lift         | 35 lb             | 25 lb             | 10 lb           | 0 lb            |
| Back Lift            | 10 lb             | 0 lb              | 0 lb            | 0 lb            |
| Leg Lift             | 45 lb             | 35 lb             | 25 lb           | 10 lb           |
| Power Lift           | 45 lb             | 35 lb             | 25 lb           | 10 lb           |
| Shoulder Lift        | 45 lb             | 35 lb             | 20 lb           | 10 lb           |
| Overhead Lift        | 35 lb             | 25 lb             | 15 lb           | 5 lb            |
| Two Hand Carry       | 45 lb             | 35 lb             | 20 lb           | 10 lb           |
| One Hand Carry       | 45 lb             | 35 lb             | 20 lb           | 10 lb           |
| Walking Push/Pull    | 55/55 lb          | 45/45 lb          | 25/25 lb        | 10/10 lb        |

Standing Push/Pull 55/55 lb      45/45 lb      25/25 lb      10/10 lb

#### NON MATERIAL HANDLING ABILITY:

| <u>Work Activity</u> | <u>Qualification</u> | <u>Work Activity</u> | <u>Qualification</u> |
|----------------------|----------------------|----------------------|----------------------|
| Bending              | Occasional           | Stair Climbing       | Frequent             |
| Squatting            | Frequent             | Ladder Climbing      | Yes                  |
| Kneeling             | Occasional           | Crawling             | Occasional           |

#### REPETITIVE & STATIC WORK ABILITY

| <u>Work Activity</u> | <u>Qualification</u> | <u>Work Activity</u> | <u>Qualification</u> |
|----------------------|----------------------|----------------------|----------------------|
| Sitting              | Frequent             | Arm Controls: Right  | Light-Medium         |
| Standing             | Constant             | Left                 | Light-Medium         |
| Walking              | Constant             | Leg Controls: Right  | Light-Medium         |
| Forward Reaching     | Frequent             | Left                 | Light-Medium         |
| Overhead Reaching    | Occasional           | Fine Hand: Right     | No                   |
| Critical Balancing   | Yes                  | Left                 | No                   |

In the restrictions that were issued in 2007, claimant was ordered to kneel on an occasional basis only. (Ex. 14, p. 10) The physical therapist also recommended claimant change positions occasionally. (Ex. 1, pp. 8-9) Claimant testified he believed he worked with a 30 pound weight restriction from the time of his FCE until the date he was terminated. (Tr. p. 123)

As a result of his work-related back injury, claimant filed a claim for workers' compensation benefits in Nebraska. According to claimant's answers to interrogatory number 17 that the Fund propounded to him, claimant has received 300 weeks of permanent partial disability benefits under Nebraska law. Claimant also answered he has a petition pending before the Nebraska Workers' Compensation Court to determine his loss of earning capacity pursuant to Nebraska law. As of the date of the hearing for second injury fund benefits, no hearing had been scheduled in Nebraska.

Next, claimant alleged he sustained a work-related injury to his right knee on April 1, 2008. (Ex. 3, p. 1) Claimant was knocked from a ladder. (Ex. 4, p. 1) He landed on his right leg, and the lower part of the leg bent backwards. (Ex. 4, p. 1) MRI testing revealed a medial meniscus tear, a medial collateral ligament strain and a moderate Baker's cyst on the popliteal fossa. (Ex. 4, p. 8)

On September 10, 2008, S.J. Stokesbary, M.D., performed a right knee arthroscopy with partial medial meniscectomy and chondroplasty of the patella, femoral trochlea and medial femoral condyle. Dr. Stokesbary also excised a popliteal cyst. (Ex. 6, p. 1) Claimant was returned to the recovery room in stable condition. (Ex. 6, p. 2) He was released to return to work on or about December 11, 2008. (Tr. p. 126) Claimant testified he returned to his same job and Dr. Stokesbary did not place any

restrictions on the right knee. (Tr. p. 127) According to records from the Nebraska Workers' Compensations Court, permanent partial disability benefits were paid for a scheduled member from November 24, 2008 through December 23, 2008. This was a period of 4 weeks and 3 days. (Ex. 3, p. 3)

Claimant sustained another injury to his right leg on February 13, 2009. (Ex. 4, p. 9) Claimant stepped from a forklift truck. He slipped; his right knee buckled. Claimant sought medical treatment from David Grote, PA-C on February 16, 2009. Mr. Grote diagnosed claimant with "Acute right knee sprain status-post arthroscopy in August of 08." (Ex. 4, p. 9) Dr. Stokesbary returned claimant to work without restrictions for the right knee on March 5, 2009. Claimant was essentially pain free. (Ex. 2, p. 12) Claimant returned to his same job.

Claimant sustained another injury to his right knee on September 1, 2009. Claimant presented to Dr. Cassens on the date of the injury. Claimant reported falling from a ladder at work. He stated he fell on the extensor service of his left elbow and the anterior portion of his right knee. (Ex. 4, p. 10) Dr. Cassens diagnosed claimant with:

ASSESSMENT:

1. Left elbow contusion.
2. Right knee contusion/sprain.

(Ex. 4, p. 10)

Claimant testified he did not miss any work time as a result of the fall on September 1, 2009. He returned to his same job. Dr. Cassens opined claimant reached maximum medical improvement on September 9, 2009. (Ex. 4, p. 11) Dr. Cassens did not impose any work restrictions on claimant for the right knee.

Claimant's final right knee injury occurred on August 4, 2010. Claimant reported he stepped on a casting and injured his right knee. (Ex. 9, p. 1) Claimant sought medical attention on September 16, 2010 at Mercy Business Health Services. (Ex. 4, p. 12) MRI testing was recommended. (Ex. 4, p. 12) Upon a follow-up examination, Dr. Cassens diagnosed claimant with: "Transient aggravation of DJD, Baker's cyst, and pain of the right knee." (Ex. 4, p. 13) Eventually, Dr. Stokesbary performed "a right total arthroplasty with cemented Stryker Triathlon components." (Ex. 6, p. 3) The arthroplasty was performed on June 24, 2011.

The orthopedic surgeon released claimant to return to work without restrictions effective August 26, 2011. Claimant was advised to wear knee pads when kneeling at work. (Ex. 2, p. 17) Claimant returned to his same job. (Tr. p. 130)

Dr. Stokesbary opined claimant had a permanent impairment to the right lower extremity according to the AMA Guides to the Evaluation of Permanent Impairment,

Fifth Edition. Dr. Stokesbary provided an impairment rating of 37 percent to the right lower extremity. (Ex. 2, p. 74) A report from the Nebraska Workers' Compensation Court indicated permanent partial disability benefits for a scheduled injury were paid from August 4, 2010 through April 25, 2012. The period equaled 78 weeks and 5 days. (Ex. 9, p. 3)

Effective October 14, 2011, claimant reported to Dr. Stokesbary that he could walk up to a mile and one-half. Claimant was working full duty at both the foundry and at Hy-Vee, and he was able to kneel at work so long as he wore pads on his knees. (Ex. 2, p. 18) Dr. Stokesbary recommended claimant return every year for follow-up care and for radiographic studies. (Ex. 2, p. 18)

Dr. Stokesbary did not impose work restrictions for the right knee until September 18, 2014. (Ex. 2, p. 42) The lifting restrictions were no different than the ones that had been imposed in 2007 for the work-related back injury. The other work restrictions included no kneeling, squatting, or ladder climbing with the right leg. (Ex. 2, p. 42)

Claimant testified in detail how the injury to the left knee occurred on December 11, 2013. (See: transcript commencing on page 94 and ending on page 96.) Claimant was in a cage attached to a forklift truck. The cage came loose from the truck and slipped toward the ground. Claimant fell six or seven feet but he did have on a safety harness. Claimant sustained a laceration to the left side of his neck and he injured his left knee. Claimant received ten stitches to his neck. His neck lacerations resolved without any permanent injury.

On January 7, 2014, claimant presented to Dr. Stokesbary with complaints of left knee pain. (Ex. 2, pp. 22-23) The orthopedic surgeon ordered MRI testing. (Ex. 2, p. 23) The testing revealed a medial meniscus tear. (Ex. 2, p. 26) On February 14, 2014, Dr. Stokesbary performed arthroscopic surgery on the left knee with chondroplasty of the medial femoral condyle, femoral trochlea and limited synovectomy. (Ex. 2, p. 27) Claimant was advised to return to work without restrictions on February 28, 2014. (Ex. 2, p. 27)

Claimant returned to full duty work. He continued working his regular duties until he underwent a left total knee arthroplasty with Stryker cemented Triathlon components. The left arthroplasty occurred on July 18, 2014. (Ex. 6, p. 5) Claimant was transferred to the recovery room in stable condition. (Ex. 6, p. 5)

Subsequently, claimant engaged in rehabilitation of his left knee. He was compliant with the recommendations prescribed for him. Dr. Stokesbary placed claimant at maximum medical improvement on March 5, 2015. (Ex. 2, p. 90) Dr. Stokesbary rated claimant as having a 37 percent permanent impairment to the left lower extremity according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 2, p. 90) Dr. Stokesbary imposed the same work

restrictions for the left leg as he had imposed for the right leg. The lifting restrictions were the same as for the back. Those lifting restrictions dated back to 2007. Claimant was to avoid kneeling, squatting and ladder climbing. (Ex. 2, p. 42)

Claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. Dr. Bansal examined claimant on May 18, 2015.

With respect to the right knee, Dr. Bansal opined claimant had reached maximum medical improvement on October 6, 2011. The evaluating physician agreed with Dr. Stokesbary; claimant had a 37 percent permanent impairment to the right lower extremity or a 15 percent whole body impairment when converted according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Bansal noted claimant had a good result from his right total knee arthroplasty. (Ex. 14, p. 64) Even though claimant had a good result from his total knee replacement, Dr. Bansal felt there was a need to increase claimant's work restrictions from the ones imposed by Dr. Stokesbary. Dr. Bansal opined in relevant portion:

These restrictions are based on a combination of my clinical evaluation and subjective reporting, and correlated with known medical pathology. They are also based on my experience as a treating Occupational Medicine physician. In this capacity, I am asked on a regular basis to assign fit-for-duty or return-to-work restrictions for well over 500 companies.

No frequent, squatting, crouching, climbing, or twisting.

Standing and walking as tolerated. Being in any one position for too long causes him discomfort. Specifically, he should avoid standing for more than 60 minutes, and no walking more than 30 minutes at a time.

Avoid multiple steps, stairs, uneven terrain, or ladders.

(Ex. 14, p. 65)

With respect to the left knee, Dr. Bansal rated claimant as having a 50 percent permanent impairment rating to the left lower extremity or a 20 percent whole body impairment when converted according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Bansal said he calculated the rating as follows:

Additions: 30 points for having pain with walking and stairs.  
23 points for 115 degrees of flexion.  
25 points for good anterolateral and medial and lateral stability.

Deductions: Extension lag of less than 10 degrees, 5 points.  
No flexion contracture is present, and good alignment.



(Ex. 14, p. 67)

The restrictions Dr. Bansal imposed were more onerous than those imposed by Dr. Stokesbary. Dr. Bansal opined:

These restrictions are based on a combination of my clinical evaluation and subjective reporting, and correlated with known medical pathology. They are also based on my experience as a treating Occupational Medicine physician. In this capacity, I am asked on a regular basis to assign fit-for-duty or return-to-work restrictions for well over 500 companies.

I would place a restriction of no lifting over 30 pounds occasionally, and no lifting over 20 pounds frequently. Doing more causes him pain, and would place additional stress to his left knee.

No frequent, squatting, crouching, climbing or twisting.

Standing and walking as tolerated. Being in any one position for too long causes him discomfort. Specifically, he should avoid standing for more than 60 minutes, and no walking greater than 30 minutes at a time.

Avoid multiple steps, stairs, uneven terrain, or ladders.

(Ex. 14, p. 67) Dr. Bansal opined claimant reached maximum medical improvement on March 5, 2015. (Ex. 14, p. 66)

Counsel for claimant sent his client to MAVR Consulting Services, Inc. Mr. Rick Ostrander, a vocational counselor, interviewed claimant. Then Mr. Ostrander issued a vocational report that was dated, July 9, 2015. (Ex. 16) Mr. Ostrander also testified as an expert at the hearing. The vocational expert concluded:

### CONCLUSION

David Weber is a 62-year-old male with limited education who is unable to read or write. He has suffered multiple work related injuries including a low back injury, multiple right knee injuries and a left knee injury. He has undergone 6 surgeries for his work related injuries since 2007. These include low back surgery, 3 right knee surgeries culminating in a right total knee arthroplasty and 2 left knee surgeries including a left total knee arthroplasty. As a result Mr. Weber has significant functional limitations which interfere with his capacity for work.

Although he has returned to work multiple times at Sioux City Foundry, he ultimately was unable to continue working and was terminated from this employment in 2014. He was unable to perform all of

the work requirements of his position and they were unable to accommodate his restrictions from Dr. Stokesbary. Based on those restrictions it is reasonably likely that Mr. Weber has suffered no less than 80% reduction in earning capacity. When considering all factors, including his age, limited educational background, inability to read or write and his multiple injuries and surgeries, it is unlikely that he will be employed on a regular basis in the future.

If one accepts is [sic] accurate Dr. Bansal's restrictions, no work can be identified within his labor market that Mr. Weber would have both the necessary vocational skills and physical capacity to perform. He therefore has suffered a 100% loss in employability and labor market access and this would reasonably result in a 100% loss in earning capacity.

(Ex. 16, pp. 9-10)

The attorney for "The Fund" retained the service of Rene Haigh, Disability and Vocational Case Manager for Encore Unlimited, LLC, to provide a vocational assessment and labor market access for claimant. Ms. Haigh provided a report that was dated, July 22, 2015. It is Exhibit A. The vocational expert concluded:

It is this consultant's opinion that Mr. Weber does have the work history, educational background, and residual functional capacity to obtain and maintain employment in the labor market in occupations classified in the light to selectively chosen medium physical demand levels as reflected above, with or without accommodations.

Based on the above Labor Market research, using median or actual wages, Mr. Weber has sustained a wage loss percentage using Dr. Bansal's restrictions of 42% and a wage loss percentage using Dr. Stokesbary's restrictions of 32%.

....

Mr. Weber reported he has applied for unemployment and has begun to apply for other work. At this time to prepare for an active impending job search, if he has not yet done so, it would be beneficial for Mr. Weber to register with the Sioux City IowaWORKS Center to obtain assistance with job applications and developing his resume, and to familiarize himself with available employment options within his background, education, training, and current functional abilities.

(Ex. A, pp. 11-12)

At the time of his hearing, claimant testified he is able to mow the lawn with his power mower, and he is capable of operating a snow blower at his home. With respect

to other household chores, claimant assists with sweeping the floors, washing the dishes, and helping with the laundry. (Tr. p. 155)

Claimant testified he had applied for disability benefits through the Social Security Administration. At the time of the hearing, claimant had not received a decision from the administrative agency.

#### RATIONALE AND CONCLUSIONS OF LAW

The first issue argument espoused by "The Fund" is a procedural question which was addressed by a former deputy workers' compensation commissioner in a ruling on a motion for continuance. The ruling was filed on April 23, 2015. The former deputy did not grant "The Fund" a motion for continuance. The basis for the denial is contained below:

On April 16, 2015 the Second Injury Fund (Fund) filed a motion of non-participation in the hearing scheduled in this matter on August 17, 2015 (back-up) and September 17, 2015 (primary) in Sioux City, Iowa, as the Fund believes that it cannot request a continuance since the matter was scheduled before the Fund was a party to the matter. A resistance from claimant is on file.

The Fund became a party when claimant's motion to amend was sustained on December 12, 2014, and as such the Fund can request a continuance or other relief if the current hearing date is prejudicial. As such, the motion for non-participation will be treated as a request for continuance. Claimant has offered to cooperate with extending discovery deadlines if necessary for the Fund.

No emergency has been shown requiring a continuance has been shown at this time. If this situation changes in the next few months, another motion to continue will be considered. The Fund's motion is denied.

(Ruling on Motion for Continuance; April 23, 2015)

On May 13, 2015, the attorney for "The Fund" filed a notice of application for interlocutory appeal as well as an application for interlocutory appeal to the workers' compensation commissioner. On May 20, 2015, claimant filed his resistance to the interlocutory appeal. On May 20, 2015, Commissioner Joseph S. Cortese, II entered a ruling. The relevant portion of the ruling provided:

I conclude that the appeal is interlocutory and that the application to grant an appeal from the interlocutory ruling should be denied.

It is therefore ordered that Second Injury's Fund application to grant an appeal from an interlocutory ruling is denied and the notice of appeal filed May 13, 2015 is dismissed.

(Ruling; May 20, 2015)

While "The Fund", in its brief, may have made some excellent arguments explaining why it should have had its portion of the case continued, the undersigned deputy does not have the authority to overturn the decision made by another deputy workers' compensation commissioner. The present issue must be decided by the workers' compensation commissioner or his designee, should "The Fund" decide to appeal the issue.

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

The next issue for resolution is whether claimant is entitled to benefits from the Second Injury Fund of Iowa. 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); Iowa Practice, Workers' Compensation, Lawyer and Higgs, section 17-1 (2006).

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 has met his burden of proof. He has established he has incurred two separate permanent losses of use to each leg. The first qualifying injury was to the right leg. Claimant underwent 4 surgeries to the right knee, culminating with a total right arthroplasty. Each surgery was the result of an injury at the foundry. Both Dr. Stokesbary and Dr. Bansal rated claimant as having a 37 percent permanent impairment to the right leg as a result of the various work injuries. Claimant was able to return to work following the surgeries. Eventually, Dr. Stokesbary indicated claimant's condition warranted restrictions. Claimant was paid permanency benefits thorough the Nebraska Workers' Compensation Court in an amount equal to 78.714 weeks.

The second injury was to the left leg. The injury also resulted in a total knee replacement. There were two impairment ratings of 37 percent to the left leg and 50 percent impairment rating to the left leg. Dr. Stokesbary imposed the same work restrictions for the left knee as he had imposed for the right knee. Claimant settled with his employer for 40 percent to the leg. Claimant was paid permanency benefits equal to 88 weeks.

The total number of weeks claimant has been paid for permanent partial disability benefits for the right and left leg injuries is equal to 166.714 weeks. The Second Injury Fund is entitled to a credit for the same amount of weeks against any Second Injury Fund benefits awarded. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990).

Claimant alleges he is permanently and totally disabled or he is an odd-lot employee. He asserts he is entitled to have his claim calculated by the industrial method. 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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See: McSpadden v. Big Ben Coal, 288 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1991).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability. See: Chamberlain v. Ralston Purina; File No. 661696 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

The undersigned accepts the work restrictions imposed by Dr. Stokesbary as being the most appropriate and credible. Dr. Stokesbary had performed all of the surgeries on claimant's knees, both right and left. The orthopedic surgeon had observed claimant in the clinical setting on numerous occasions. From the voluminous medical records submitted by claimant, it appears claimant and Dr. Stokesbary had an excellent physician-patient relationship. Claimant was not reluctant to explain his condition to Dr. Stokesbary. Therefore, the surgeon assigned restrictions that were appropriate, given claimant's many verbal reports to his doctor.

The work restrictions assigned for the knees closely resemble the restrictions previously imposed for the low back effective October 2, 2007. (Ex. 14, p. 10) At that point in time, claimant was already placed into the light-medium category of labor as defined by the U.S. Department of Labor. (Ex. 14, p. 10) Claimant worked under those restrictions until after claimant had injured his left knee.

Ms. Valerie Corbin and other members of management at the foundry terminated claimant on November 4, 2014. Claimant testified he was terminated because of all of the restrictions placed upon him. (Tr. p. 144) Claimant did not reach maximum medical improvement until March 5, 2015.

Once claimant filed for unemployment insurance benefits, he was required to apply for two jobs per week. Between May 1, 2015 and August 7, 2015, claimant had applied for 26 positions in the Sioux City area. He also applied for other positions suggested to him by the vocational expert, Ms. Haigh. Claimant had some interviews but no one would hire him once he explained his restrictions to the prospective employer.

Mr. Ostrander, claimant's vocational expert, opined claimant had an 80 percent reduction in earning capacity when the restrictions from Dr. Stokesbary are taken into

consideration. The 80 percent reduction in loss of earning capacity seems logical when claimant's educational skills are taken into consideration. An 80 percent industrial disability award results in claimant's total entitlement to be 400 weeks of benefits. However, the Second Injury Fund of Iowa is entitled to a credit for the permanent impairment attributable to both the first and second qualifying injuries. Iowa Code section 85.64.

As indicated earlier, the credit in this case is 166.714 weeks. From the 400 week entitlement, the credit 166.714 is subtracted. The Second Injury Fund owes claimant 233.286 weeks of benefits commencing from October 27, 2015, the day after the full commutation was approved by the Division of Workers' Compensation.

Interest accrues on unpaid Second Injury Fund benefits from the date of the decision. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990).

The next issue is the matter of the weekly benefit rate. Claimant stated on the hearing report, the weekly benefit rate was \$536.99. The Second Injury Fund asserts the rate is \$530.70 per week. In the full commutation, the employer and the claimant stipulated claimant's gross weekly wage was \$835.43. Claimant was married and entitled to 2 exemptions. The employer and the claimant stipulated on the full commutation, the weekly benefit rate for permanency benefits was \$538.71. The same calculations were reported to the Division of Workers' Compensation in the Payment Activity Report, (PAR). The employer and the claimant agreed the week ending November 13, 2013 should not be included as a representative week as it was the week involving Thanksgiving. The undersigned is in agreement with the calculations established in the full commutation. Claimant's weekly benefit rate is \$538.71

Pursuant to Iowa Code section 85.39, claimant is requesting a portion of the cost of the independent medical examination performed by Dr. Bansal. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The employer paid \$1,755.21 of the \$3,150.00 total examination bill. The Fund did not seek an independent medical examination of its own. The rating provided by Dr. Stokesbary, was not a physician retained by the Fund. Therefore, the Fund is not liable for the balance of Dr. Bansal's bill.

The final issue is costs to litigate. The deputy workers' compensation commissioner has discretion to tax costs. Dickenson v. John Deere Products Engineering, 395 N.W.2d 644, 647 (Iowa App. 1986). It is the determination of this deputy; each party shall pay her, its/their own costs to litigate this claim.

Iowa Code section 86.40 governs costs. The section reads:

All costs incurred in the hearing before the commissioner shall be taxed at the discretion of the commissioner.

Witness fess and mileage on hearings before the workers' compensation commissioner shall be the same as in the district court. Iowa Code section 86.41 and Iowa Codes section 622.69 through 622.75

876 IAC 4.33 provides:

**876—4.33 (86) Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery.



Rule 876 IAC 4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. Dec. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. Dec. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to rule 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. Dec. July 21, 2009).

It is the determination of the undersigned; the Second Injury Fund of Iowa is liable for the following costs:

|                                |            |                   |
|--------------------------------|------------|-------------------|
| Mental Health Associates, LLC, | \$565.00   |                   |
| MVR Consulting Services, INC., | \$1,000.00 |                   |
| Witness fees as allowed by law |            |                   |
| Total                          | \$1,565.00 | plus witness fees |

ORDER

THEREFORE, IT IS ORDERED:


The Second Injury Fund of Iowa shall pay unto claimant two hundred thirty-three point eight six (233.86) weeks of benefits pursuant to Iowa Code section 85.64 and said benefits shall commence from October 27, 2015, and all benefits shall be paid at the rate of five hundred thirty-eight and 71/100 dollars (\$538.71) per week.

Accrued benefits shall be paid in a lump sum, together with interest, as required by law.

The Second Injury Fund of Iowa shall pay costs as discussed in the body of this decision.

The Second injury Fund of Iowa shall file all reports as required by this division.

Signed and filed this 11<sup>th</sup> day of August, 2016.

  
MICHELLE A. MCGOVERN  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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MAM/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.