BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRANDON RUNDELL, Claimant, vs. JOHNSON COUNTY REFUSE, Employer, and CONTINENTAL INDEMNITY CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 5067416 A R B I T R A T I O N D E C I S I O N Head Note No.: 1803.1, 2502, 3003, 3202

STATEMENT OF THE CASE

Claimant, Brandon Rundell, filed a petition in arbitration seeking workers' compensation benefits from Johnson County Refuse, Inc. (Johnson County), employer, Continental Indemnity Company, insurer, and the Second Injury Fund of Iowa (Fund) all as defendants. This matter was heard in Des Moines, Iowa on March 10, 2020 with a final submission date of March 31, 2020.

The record in this case consists of Joint Exhibits 1-5, Claimant's Exhibits 1-13, Defendant Johnson County and Insurer's Exhibits A-L, the Fund's Exhibits AA-BB, and the testimony of claimant.

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

ISSUES

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

Rate.

Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

Whether claimant sustained qualifying injuries for the purposes of Fund benefits.

The extent of claimant's entitlement to Fund benefits.

The amount of credit the Fund is due if claimant is entitled to Fund benefits.

FINDINGS OF FACT

Claimant was 47 years old at the time of hearing. Claimant has a G.E.D.

Claimant worked at his father's auto body shop. He worked for a lawn service and installed carpet. He worked for Johnson County in 2003 driving garbage and recycling trucks. Claimant was terminated from that job for a positive drug test. After working for Johnson County, claimant installed insulation, and loaded and delivered furniture. (Exhibit AA, pages 4-10)

In April of 2014, claimant was again hired by Johnson County to drive garbage and recycling trucks.

On August 10, 2015, claimant stepped out of his truck on his right foot and rolled his ankle. Claimant completed his shift that day.

On August 11, 2015, claimant was evaluated at the University of Iowa Hospitals and Clinics (UIHC) after rolling his ankle at work. An x-ray of the right ankle showed no fracture or dislocation, but soft tissue swelling. (Joint Ex. 1, pp. 1-2) Claimant was recommended to use ice and to elevate his ankle. He was taken off work until August 17, 2015. (Jt. Ex. 1, p. 3)

Claimant returned to UIHC on August 21, 2015. Claimant complained of continued pain. A second x-ray showed no dislocation or fracture. Claimant was assessed as having a soft tissue injury. (Jt. Ex. 1, pp. 6-9)

Claimant was recommended to have physical therapy. (Jt. Ex. 1, p. 9) Claimant testified he did not have any physical therapy for the right ankle. He testified he has had no further treatment for his right ankle since August 21, 2015. (Transcript p. 59) Claimant testified that the right ankle gave him some issues after he returned to work.

On August 10, 2016, claimant stepped out of a truck on uneven ground and rolled his left ankle.

On August 10, 2016, claimant was evaluated by Ernest Perea, M.D., with complaints of left ankle pain. Claimant was put in a walking boot. (Jt. Ex. 2, pp. 11-12)

Claimant returned to Dr. Perea on August 15, 2016 with continued complaints of tenderness in the left ankle. An MRI was recommended. (Jt. Ex. 2, p. 15) Claimant underwent an MRI. It showed a high grade ATFL sprain and a low grade anterior tib-fib syndesmotic abnormality. (Jt. Ex. 3, pp. 18-19)

On September 9, 2016, claimant was evaluated by Bradly Bussewitz, D.P.M., an orthopedic surgeon. Claimant was put on light duty and prescribed physical therapy. (Jt. Ex. 3, pp. 20-21)

On November 16, 2016, claimant returned to Dr. Bussewitz. Claimant indicated his symptoms had worsened. Claimant was recommended to have further physical therapy. (Jt. Ex. 3, p. 25)

Claimant returned to Dr. Bussewitz on December 16, 2016 and again reported no improvement in his symptoms even though he had continued on physical therapy. A repeat MRI was recommended. (Jt. Ex. 3, p. 27)

Claimant underwent another MRI to the left ankle on December 22, 2016. It showed no new abnormalities. (Jt. Ex. 3, p. 29)

Claimant returned in follow-up with Dr. Bussewitz on January 5, 2017. Surgery was discussed and chosen as a treatment option. (Jt. Ex. 3, pp. 31-32)

On January 23, 2017, claimant underwent surgery with Dr. Bussewitz. Surgery consisted of extensive debridement, an ankle Brostrom stabilization and a peroneus longus repair. (Jt. Ex. 4, pp. 80-81)

Claimant underwent physical therapy following surgery. (Jt. Ex. 3, p. 37)

Claimant returned to Dr. Bussewitz on April 27, 2017. Claimant indicated he was mowing his lawn, rolled his ankle and exacerbated his pain. Claimant was put in a boot. (Jt. Ex. 3, p. 88)

Dr. Bussewitz treated claimant on June 1, 2017. Claimant reported he again reinjured his left ankle when he rolled it, while taking out the garbage. Claimant was kept off of work for six weeks. (Jt. Ex. 3, pp. 40-41)

Claimant saw Dr. Bussewitz on August 11, 2017. Claimant twisted his ankle again while he was in a wave pool at a waterpark. Claimant had not returned to work, but continued physical therapy. He was continued on physical therapy and returned to a four-hour workday. (Jt. Ex. 3, pp. 45-46)

Claimant returned to Dr. Bussewitz on September 13, 2017. Claimant indicated he again reinjured his left ankle when another shopper hit his ankle with a grocery cart. Claimant told Dr. Bussewitz he did not think he could return to work given the "demands" of work. Claimant was kept off work. A repeat MRI was ordered. (Jt. Ex. 3, pp. 50-51)

Dr. Bussewitz reviewed the MRI, which showed inflammation. Claimant was taken off work for a month. (Jt. Ex. 3, p. 55)

Claimant returned to Dr. Bussewitz on October 25, 2017. Claimant indicated continued pain and said he was unable to bear weight or perform daily activities. A second surgery was discussed and chosen as a treatment option. (Jt. Ex. 3, pp. 56-57)

On December 10, 2017, claimant underwent a second surgery with Dr. Bussewitz. Surgery consisted of a peroneus brevis repair, a peroneus longus repair, and a tenosynovectomy of the peroneal tendon. (Jt. Ex. 4, pp. 82-83)

Claimant testified his ankle did not improve after his second surgery.

Claimant saw Dr. Bussewitz on January 18, 2018. Claimant was doing well. Claimant was told to bear weight as tolerated and return to physical therapy. (Jt. Ex. 3, p. 61)

Claimant returned to Dr. Bussewitz on February 28, 2018. Claimant was unable to bear weight without being on crutches. Claimant said he could not work. Claimant said he reinjured his ankle again when he took a misstep in a bathroom. Claimant was referred to a pain management specialist, Fred Dery, M.D. (Jt. Ex. 3, pp. 63-64)

Claimant saw Dr. Dery on April 11, 2018. Dr. Dery did not believe claimant had evidence of complex regional pain syndrome (CRPS). Claimant was prescribed physical therapy and pain medication. (Jt. Ex. 3, p. 66)

Claimant returned to Dr. Dery on June 13, 2018 with continued complaints of left ankle pain. Claimant was treated with medication and given referrals for vocational rehabilitation. (Jt. Ex. 3, p. 24)

On August 10, 2018, claimant saw Dr. Bussewitz with continued complaints of pain. Dr. Bussewitz opined claimant's pain was related to some kind of nerve pathology. Claimant had exhausted his care with Dr. Dery. (Jt. Ex. 3, pp. 77-79)

On October 5, 2018, claimant was evaluated by Joseph Chen, M.D. at the UIHC for an IME. Dr. Chen assessed claimant as having chronic left ankle pain. He told claimant it was essential for him to work on conditioning of the ankle. He told claimant chronic pain was a process that doctors rarely cure. Dr. Chen recommended against further surgery. (Jt. Ex. 5, p. 88)

Dr. Chen found claimant was at maximum medical improvement (MMI) as of August 10, 2018. He believed claimant had an 11 percent permanent impairment to the

left ankle. He recommended vocational rehabilitation for claimant. He indicated claimant would require ankle boots or a lace-up ankle brace. (Jt. Ex. 5, pp. 89-90)

In a June 6, 2019 letter, claimant was told by his employer that he was still enjoyed with Johnson County and that the employer still had work for him. (Ex. I, p. 65) A second letter was sent to claimant indicating that Johnson County still had work for him on August 16, 2019. (Ex. BB, p. 15) Claimant testified he did not take Johnson County up on the offer to return to work as he did not think he could do the job.

In a July 30, 2018 report, Robin Sassman, M.D., gave her opinions of claimant's condition following an IME. Claimant had constant pain in the left ankle. Claimant's left ankle swelled daily. Claimant noted color changes in the ankle. Claimant had some pain in the right ankle. (Ex. 1, pp. 15-16)

Dr. Sassman opined that claimant fulfilled the Budapest criteria for CRPS, but noted " . . . CRPS is a diagnosis of exclusion and he had not yet had an EMG of the lower extremity to determine if there is some alternative explanation for his symptoms, such as compression of a nerve in the ankle." (Ex. 1, p. 19)

Dr. Sassman recommended an EMG to the left lower extremity. She said claimant was not yet at MMI, but found claimant at MMI if further treatment was not approved. Dr. Sassman opined that claimant had a 15 percent permanent impairment to the left lower extremity. (Ex. 1, p. 20)

Dr. Sassman found that claimant had a two percent permanent impairment to the right lower extremity based on a loss of inversion. (Ex. 1, p. 21)

Dr. Sassman limited claimant to standing and walking occasionally. She restricted claimant to no use of a ladder or walking on uneven surfaces. (Ex. 1, p. 21) She also recommended claimant may benefit from a mental health evaluation. (Ex. 1, p. 19)

In a September 18, 2019 letter, Charles Mooney, M.D., gave his opinions of claimant's condition following an IME. Claimant had severe left ankle pain. Claimant had pain with weight bearing. (Ex. A, pp. 5-6)

Dr. Mooney assessed claimant as having an anterior talofibular ligament disruption and a partial tearing of the peroneal tendon on the left. He found claimant was at MMI as of approximately February 28, 2018. Dr. Mooney found that claimant had an 11 percent permanent impairment to the left lower extremity. He found claimant did not require additional medical care. He also recommended claimant wear an ASO brace or a supportive ankle work boot. He did not find that claimant's mental health injury was related to a work injury. (Ex. A, pp. 8-9)

Dr. Mooney opined that claimant did not meet criteria for chronic pain syndrome and also opined that claimant did not meet criteria for CRPS. (Ex. A, pp. 9-10)

In a supplemental opinion, dated December 10, 2019, Dr. Mooney opined that claimant did not require an EMG of the left lower extremity. (Ex. A, pp. 11-12)

In a December 11, 2019 letter, written by defense Johnson County and insurer's counsel, Dr. Bussewitz indicated he had exhausted all medical treatment for claimant. He opined claimant's left ankle was stable. Dr. Bussewitz also opined he reviewed claimant's medical records and they did not indicate claimant exhibited any sign of mental health concerns. (Ex. C)

In a January 28, 2020 vocational report, Rene Haigh, CRC, MS, gave her opinions of claimant's vocational opportunities. Ms. Haigh opined that using Dr. Sassman's restrictions, claimant remained employable in the labor market. She opined that given Dr. Mooney's opinions, claimant had a zero percent loss of access to pre-injury employment options. She opined that claimant could return to work in a very heavy physical demand level without accommodations. (Ex. D)

Claimant testified he did not apply for any of the jobs recommended by Ms. Haigh, as they were not suited for him. Claimant did testify that he believed he could return to work doing auto detailing.

In a February 5, 2020 letter, Thomas Gorsche, M.D., gave his opinions of claimant's condition following an IME. Dr. Gorsche found claimant had no evidence of CRPS. He opined claimant reached MMI on February 28, 2018. Dr. Gorsche found claimant had a nine percent permanent impairment to the left lower extremity. He did not believe claimant required additional medical treatment. He also indicated claimant had no permanent restrictions. (Ex. F)

Claimant testified that because of his left ankle, he is unable to run. He says he walks slowly and can only walk a block or two. He says he has difficulty tying his shoes, as they irritate his surgical scar. Claimant said he has difficulty climbing stairs and getting in and out of a truck.

Claimant testified he wanted to have the EMG recommended by Dr. Sassman. He says he does not take prescription medication for his injuries.

Claimant testified he has applied for jobs, but forgotten who the employers were.

For the 14 weeks preceding claimant's August 2016 injury, claimant worked the following hours:

WEEK ENDING	**HOURS WORKED**
05/07/16	51.5
05/14/16	51
05/21/16	50.25

05/28/16	41.5
06/04/16	47.83
06/11/16	25.5
06/18/16	46.25
06/25/16	43.75
07/02/16	51
07/09/16	43.83
07/16/16	47.25
07/23/16	43.25
07/30/16	51.75
08/06/16	42.5

(Ex. 10, p. 54)

CONCLUSIONS OF LAW

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

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

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).

If 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 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.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Claimant contends he is entitled to permanent partial disability benefits using an industrial disability analysis for three reasons. Claimant contends he has CRPS. Claimant contends he has a chronic pain syndrome for his left ankle. Claimant also argues he has a mental health injury due to his left ankle injury.

No expert has opined that claimant has a mental health injury that was caused by his August of 2016 left ankle injury. There is no evidence that claimant has sought mental health treatment related to his August 2016 left ankle injury. Given this record,

claimant has failed to carry his burden of proof he has a mental health injury related to his August 2016 left ankle injury.

Regarding claimant's claim of CRPS, Dr. Dery, Dr. Mooney, and Dr. Gorsche all opine that claimant does meet the criteria for having CRPS. (Jt. Ex. 3, p. 66; Ex. A, pp. 9-10; Ex. F)

Dr. Sassman was retained as an expert by claimant. Dr. Sassman noted that the diagnosis of CRPS was hypothetical, but that she was unable to diagnose claimant with CRPS without additional testing. (Ex. 1, pp. 18-19) Given this record, claimant has failed to carry his burden of proof he sustained CRPS caused by the August 2016 left ankle injury.

Claimant also contends he has a chronic pain syndrome caused by the August 2016 ankle injury. Several healthcare providers have indicated claimant has chronic pain. No medical care provider or expert has identified any chronic pain condition that is ratable under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. No healthcare provider or expert has opined that claimant has a permanent impairment related to a chronic pain condition. Given this record, claimant has failed to carry his burden of proof he has a permanent impairment concerning a chronic pain condition.

Claimant has failed to carry his burden of proof he has a mental health condition caused by his August 2016 left ankle injury. He failed to carry his burden of proof he has CRPS caused by his August 2016 ankle injury. Claimant failed to carry his burden of proof he has a ratable chronic pain condition due to the August 2016 injury. Based on this, claimant has failed to carry his burden of proof his August 2016 ankle injury resulted in an industrial disability. For this reason, claimant's left ankle injury is assessed as a scheduled member disability under Iowa Code section 85.34(2).

Four experts have opined regarding the permanent impairment to claimant's left lower extremity. Dr. Chen and Dr. Mooney both found that claimant had an 11 percent permanent impairment to the left lower extremity. (Jt. Ex. 5, pp. 89-90; Ex. A, pp. 8-9)

Dr. Sassman found that claimant had a 15 percent permanent impairment to the left lower extremity. Dr. Sassman's additional 4 percent rating to the left lower extremity is based on a finding that claimant had dysesthesia related to the sural and peroneal nerve. (Ex. 1, p. 20) There is no testing or study, in evidence in the record, indicating claimant sustained nerve damage. Based on this, Dr. Sassman's opinion that claimant has an additional 4 percent permanent impairment due to nerve damage is found not convincing.

Dr. Chen and Dr. Mooney opined that claimant had an 11 percent permanent impairment to the left lower extremity. Their findings and opinions regarding permanent impairment are similar to those of the treating physician, Dr. Bussewitz. Based on this, it is found that claimant has sustained an 11 percent permanent impairment to the left

lower extremity due to the August 2016 ankle injury. Claimant is due 24.2 weeks of permanent partial disability benefits (11 percent x 220 weeks).

The next issue to be determined is rate.

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

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Claimant contends his average weekly wage is $799.86 per week. Defendant employer and insurer contends claimant's average weekly wage is $772.00 per week. The difference between the two average weekly wages stems from the week ending June 11, 2016, where claimant worked 25.5 hours for the week. Defendants believe this week should be included in the calculation of rate, while claimant believes this week should be excluded.

Claimant's earning records, shown in both Exhibit 8 and Exhibit K, indicate claimant routinely worked 40 hours a week and often worked overtime. For this reason, it is found that the week ending June 11, 2016, where claimant only worked 25.5 hours, should be excluded, as it does not fairly reflect claimant's customary earnings.

If the week ending June 11, 2016 is excluded, claimant earned $10,398.22 for the 13-week period prior to the injury. This results in average weekly wage of $799.86. Claimant was single with 1 exemption. His rate is $488.84 per week.

The next issue to be determined is whether claimant is entitled to reimbursement for an IME under Iowa Code section 85.27.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Dr. Chen, the employer-retained expert, gave his opinions of claimant's permanent impairment in a report dated October 5, 2018. (Ex. 5) Dr. Sassman, the employee-retained expert, gave her opinion in a report dated July 30, 2019. Given the chronology of the reports, defendant employer and insurer are liable for reimbursing claimant for expenses associated with the IME, including mileage.

The next issue to be determined is whether claimant is entitled to alternate medical care.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

In her IME report, Dr. Sassman recommended claimant have an EMG for the left lower extremity. Dr. Sassman also recommended that once the EMG is completed, claimant be evaluated by another lower extremity specialist. (Ex. 1, p. 19) Dr. Sassman also indicated claimant should be evaluated by a mental health professional. (Ex. 1, p. 19)

No expert has opined that claimant has a mental health injury or condition caused by the August of 2016 ankle injury. Based on this, claimant has failed to carry his burden of proof that defendants' denial of a mental health evaluation is unreasonable.

Dr. Sassman did not opine that claimant had CRPS, but recommended the EMG for a potential CRPS diagnosis. (Ex. 1, p. 19) Dr. Chen evaluated claimant once for an IME. Dr. Chen did not believe an EMG or further medical testing was necessary. (Jt. Ex. 5, p. 96)

Claimant was evaluated by Dr. Mooney once for an IME. Dr. Mooney did not believe an EMG or any additional medical testing was necessary. (Ex. A, pp. 10-12)

Claimant underwent an IME with Dr. Gorsche. Dr. Gorsche did not believe claimant required further medical treatment or an EMG. (Ex. F, p. 5)

Dr. Bussewitz actively treated claimant for two years. In Dr. Bussewitz's final opinion, he indicated that he had exhausted all reasonable medically necessary treatment for claimant. (Ex. C)

Dr. Sassman recommended an EMG only for the purposes of determining if claimant has CRPS. As noted above, claimant has failed to carry his burden of proof that he has CRPS that was caused by the August 2016 left ankle injury. Four other experts have opined that claimant does not require an EMG or additional treatment. Given this record, claimant has failed to carry his burden of proof that defendants' denial of an EMG or further evaluation by a lower extremity expert is unreasonable. Given this record, claimant has failed to carry his burden of proof that he is entitled to alternate medical care.

The next issue to be determined is if claimant has a qualifying first and second injury for the purposes of Fund benefits.

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

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

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

Claimant alleges he sustained a qualifying first injury when he rolled his right ankle on August 10, 2015. Claimant attended a medical appointment for the alleged injury on August 11, 2015 and August 21, 2015. Claimant had two x-rays of the ankle at both appointments. Both x-rays showed claimant had no fracture or dislocation. (Jt. Ex. 1, pp. 5, 9)

Claimant was eventually assessed as having a soft tissue injury to the right ankle. (Jt. Ex. 1, p. 6) Claimant was recommended to have physical therapy.

Claimant never attended any physical therapy. He never sought additional medical treatment for the right ankle following the August 21, 2015 doctor visit. (Tr. p. 59)

Claimant returned to Johnson County and continued to work his regular job with no accommodations and no restrictions until his August 2016 left ankle injury.

When claimant initially treated for his August 2016 left ankle injury he was asked for his medical history. Claimant did not indicate a prior right ankle injury in 2015. (Jt. Ex. 2, p. 12)

Claimant treated with Dr. Bussewitz on September 9, 2016. There is no mention, in claimant's prior medical history, of a 2015 right ankle injury. (Jt. Ex. 3, p. 20)

Claimant treated with Dr. Perea, Dr. Bussewitz and Dr. Dery for approximately two years regarding his left ankle injury of 2016. There is no mention, in these records, of a 2015 right ankle injury.

Claimant was evaluated by Dr. Bussewitz on August 10, 2018. At that time, Dr. Bussewitz noted claimant had no restrictions in range of motion in either ankle. (Jt. Ex. 3, p. 78)

Claimant was evaluated by Dr. Chen on August 5, 2018. Dr. Chen did not see any swelling or loss of range of motion in claimant's right ankle. (Jt. Ex. 5, p. 86)

Dr. Sassman evaluated claimant one time for an IME. In a report, Dr. Sassman opined that claimant had a two percent permanent impairment to the right lower extremity due to a loss of inversion. (Ex. 1, p. 21) Dr. Sassman's opinions regarding permanent impairment are problematic for several reasons. First, Dr. Sassman's opinions that claimant has a loss of range of motion in the right ankle is contrary to prior exams conducted by Dr. Bussewitz and Dr. Chen. Dr. Sassman offers no explanation why claimant had full range of motion in his right ankle in August and October of 2018, but yet had a loss of range of motion in the IME exam. As noted, following the August 21, 2015 exam, there is no reference in any of the medical records regarding a right ankle injury. Dr. Sassman notes that she reviewed nearly 900 pages of records regarding claimant. (Ex. 1, p. 7) Dr. Sassman offers no explanation why there is a scarcity of references to a right ankle injury in nearly 900 pages of records, yet claimant has a right ankle impairment from the 2015 injury.

Claimant had a soft tissue injury to his right ankle in August 2015. He received medical treatment on two occasions for that soft tissue injury and never sought treatment again. Claimant was offered physical therapy, but did not pursue physical therapy. Claimant returned to his regular job with Johnson County and worked for another year with no accommodations or permanent restrictions. Evaluations made by

treating physicians in August and October 2018 found that claimant had no loss of range of motion in the right ankle. For these reasons, the opinions of Dr. Sassman regarding claimant's permanent impairment to the right lower extremity are found not convincing.

Claimant had no treatment for the right ankle after August 21, 2015. Claimant was assessed as having a soft tissue injury to his right ankle. He was offered and turned down physical therapy. He returned to his regular duties at Johnson County with no accommodations or restrictions. There is no record that claimant had any difficulty doing his job at Johnson County due to his soft tissue injury in his right ankle. This record suggests that claimant no problem whatsoever with his right ankle after his August 21, 2015 medical visit. Given this record, it is found that claimant's testimony that he has had some difficulty with the right ankle, is not credible.

Claimant was evaluated as having a soft tissue injury. He had two medical visits regarding that injury. Claimant was offered and turned down physical therapy for the soft tissue injury. Claimant returned to work at his regular job duties at Johnson County. He had no accommodations and no permanent restrictions on his job until his left ankle injury of August 2016. Records made in 2018 indicated claimant had normal range of motion in his right ankle. Dr. Sassman's opinion regarding permanent impairment to the right ankle are found not convincing. Claimant's testimony regarding potential problems he has had with his right ankle are found not credible. Given this record, claimant has failed to carry his burden of proof he sustained any permanent impairment to the right ankle regarding the August 2015 injury. As a result, claimant has failed to prove that he has a loss to a qualifying first injury for the purposes of Fund benefits.

As claimant has failed to carry his burden of proof he sustained a qualifying first injury for the purposes of Fund benefits, the issue of the extent of claimant's entitlement to Fund benefits, and the amount of credit the Fund would be due are moot.

ORDER

THEREFORE, IT IS ORDERED:

That defendant employer and insurer shall pay claimant twenty-four point two (24.2) weeks of permanent partial disability benefits at the rate of four hundred eighty-eight and 84/100 dollars ($488.84) per week commencing on October 6, 2018.

That defendants shall pay claimant temporary benefits at the rate of four hundred eighty-eight and 84/100 dollars ($488.84) per week.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal

reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That defendants shall be given credit for benefits previously paid.

That defendant employer and insurer shall reimburse claimant for costs associated with Dr. Sassman's IME, including mileage.

That defendant employer and insurer shall pay costs.

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

Signed and filed this 27th day of May, 2020.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Dirk Hamel (via WCES)

Lindsey E. Mills (via WCES)

Meredith C. Cooney (via WCES)

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