BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MERIM RAKANOVIC, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, and SECOND INJURY FUND OF IOWA Insurance Carrier, Defendants.	File No. 5055533 ARBITRATION DECISION Head Note Nos.: 1803; 3202; 4000
MERIM RAKANOVIC, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, Defendant.	File No. 5055534 ARBITRATION DECISION Head Note Nos.: 1801; 1803; 4000 3202

STATEMENT OF THE CASE

Merim Rakanovic, claimant, filed a petition in arbitration seeking workers' compensation benefits against Tyson Foods, Inc., a self-insured employer, and Second Injury Fund of Iowa, for alleged work injuries dated December 30, 2014 and October 8, 2015.

This case was heard on February 1, 2017, in Waterloo, Iowa. The record was closed as of February 1, 2017, and the case was considered fully submitted on February 17, 2017, upon the simultaneous filing briefs.

The record consists of joint exhibits 1-15, claimant's exhibits 16-20 and defendants' exhibits A-E, along with the testimony of the claimant.

ISSUES

File No. 5055533 (Date of injury, December 30, 2014):

1. The extent of claimant's permanent disability.
2. Whether claimant is entitled to benefits from the Fund; and if so, the extent of claimant's industrial disability;
3. If not, the extent of claimant's functional loss arising out of the right lower extremity injury;
4. Entitlement to medical expenses identified in Exhibit 20;
5. Whether defendant employer is entitled to a credit of previously paid benefits;
6. Whether claimant is entitled to penalty benefits;
7. Whether claimant is entitled to an assessment of costs and interest.

File No. 5055534 (Date of injury, October 8, 2015):

1. Whether claimant is entitled to temporary benefits;
2. The extent of claimant's permanent disability, if any.
3. Entitlement to medical expenses identified in Exhibit 20;
4. Whether defendant employer is entitled to a credit of previously paid benefits;
5. Whether claimant is entitled to penalty benefits;
6. Whether claimant is entitled to an assessment of costs and interest.

STIPULATIONS

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.

File No. 5055533:

The parties agree that the claimant sustained an injury on December 30, 2014 which arose out of and in the course of his employment. They further agree that the injury was the cause some temporary disability.

The commencement date for permanent partial disability benefits, if any are awarded, would be August 20, 2015.

At the time of the injury, the parties agree the claimant's gross earnings were $681.51 per week, that he was married and entitled to three exemptions. Based on those foregoing numbers the weekly benefit rate is $458.85.

Prior to the hearing the claimant was paid 41.8 weeks of compensation at the rate of $458.85.

File No. 5055534:

The parties agree the claimant sustained injury on October 8, 2015 which arose out of in the course of his employment with the defendant and that the injury was the cause of some temporary disability.

Claimant is seeking temporary benefits from December 3, 2015 through January 8, 2016. Defendant employer agrees that the claimant was off work during this period of time but will not stipulate the claimant is entitled to any benefits for that time off.

The injury is industrial in nature and commencement date for permanent partial disability benefits is October 9, 2015.

At the time of the injury, claimant's gross earnings were $670.35 per week. He was married and entitled to three exemptions. Based on those numbers, the parties believe the weekly benefit rate to be $451.87.

FINDINGS OF FACT

Claimant is a 50 year old person born in Bosnia. His educational background includes high school in Bosnia and some vocational or technical training. He is not able to read or write in English, but has basic conversational skills. Prior to his immigration to the United States, claimant worked in the metal and construction industry. He worked in a shipyard, developed welding skills, and manufacturing. The positions involved heavy manual labor.

During his time as a refugee in Germany, he worked in a candle manufacturing company as a forklift operator. Claimant returned to Bosnia for a brief time, but was unable to find work in the Serbian occupied Bosnia. He immigrated to the United States in April 2000.

His first position was working at Sun-Micro Stamping where he would use machinery to stamp and mold metal. He then worked at Hunter Douglas assembling window shades. Following Hunter Douglas, he went to work for West a company producing vials that the doctors would use to extract medicine from. He was let go from the company for not knowing enough English. He then worked in the shipping department of a company that manufactured commercial air conditioning units.

He moved to South Dakota where he worked at a meat processing plant and then moved again after his wife found employment. In 2010, he was hired by defendant employer to fill a small forklift operator position. The Mule Driver operates a machine that has a riding platform situated approximately 10 inches off the floor. There is a steering handle on one side and a hold bar on the other. There are also push buttons which are used to raise or lower the forklift. (Ex. D) The official physical requirements include lateral back flexion, some light lifting of up to 15 pounds, low force in pushing and pulling, some reaching over the head, as well as, from waist to chest, prolonged standing, grasping, and simultaneous use of hands. (Ex. D: 1-2) Claimant testified that he would have to lift several hundred pounds of meat.

His past medical history is significant for back problems arising out of a work injury in 2003, a March 2007 motor vehicle collision, and a November 2009 motor vehicle collision. Diagnostic testing following the 2007 motor vehicle collision showed that he had an annular tear and disc bulging at L4/5 and L5/S1. (Ex 15, p. 2) It was recommended that he undergo a discogram. (Ex. 15-2) He received only chiropractic treatment following the 2009 injury. (Ex. A, p. 42) Claimant maintains he had no ongoing back pain arising out of that injury. Claimant underwent a preemployment physical for the defendant employer on June 30, 2010, which reflected no impairments or abnormalities. (Ex. 1, pp. 1-4) Claimant was cleared for all employment activities for defendant employer. He went through a series of quick dexterity and range of motion tests. He was told to always be ready to lift up to 50 pounds.

In July 2010, claimant fell at home resulting in injury to his left lower extremity. He was diagnosed with Lisfranc's injury. (Ex. 2, p. 1) After conservative treatment, Vinko Bogdanic, M.D., determined claimant would need a fusion. (Ex 3, p. 3) At that time, claimant declined surgery and testified that he was able to tolerate the discomfort with over-the-counter medications and rest. When his pain worsened, claimant underwent surgery in December 2016. At hearing, claimant testified he continues to receive treatment for his left foot.

On December 30, 2014, claimant's right lower leg was pinched between a lift and an engine resulting in a fracture of the tibia. (Ex. 4, p. 5) Surgery for the right tibia fracture took place the following day by Thomas Gorsche M.D. (Ex. 4, p. 11) On January 15, 2015, claimant was seen by Dr. Gorsche in follow up. (Ex. 3, p. 7) Claimant was "going stir crazy" and requested a sedative but Dr. Gorsche offered a scooter instead. (Ex. 3, p. 7) Four days later, claimant called with increased pain. Dr. Gorsche asked claimant to come to the office. While there, the short leg splint was removed and claimant was fitted with an equalizer cast boot. (Ex. 3, p. 8)

On February 18, 2015, claimant was sent by Robert L. Gordon for an on-site medical examination for situational adjustment issues.

> I am evaluating Mr. Rakanovic primarily today regarding situational adjustment issues. He reports to me that he has been somewhat disappointed that he has not been able to get out of his house more than he has since his surgery. He has not worked at Tyson Foods since his incident. It is of note that he is wearing a walker boot at this time, so he is able to get out of the house if he would like, but he does not really have anywhere to go, as he is not currently working due to Tyson Foods policy and also he is not able to drive with the walker boot on.

(Ex. 7, p. 1) Dr. Gordon recommended therapy for the right lower extremity and possible follow up with claimant's mental health provider for an increase in prescriptions. (Ex. 7, p. 3) His psychological issues improved but his functional lower impairment continued. Dr. Gordon prescribed pool therapy. (Ex. 7, p. 9)

On February 10, 2015, claimant was returned to sedentary work. (Ex. 3, p. 11) He continued to have follow up appointments with Dr. Gorsche. On April 8, 2015, Dr. Gorsche prescribed the use of a cane. He continued physical therapy and allowed claimant to do sit down work "which is not available." (Ex. 3, p. 17) On May 7, 2015, Dr. Gorsche recommended claimant wean himself from the boot. "[H]e does have some discomfort when he is out of the boot, no pain when he is in the boot." (Ex. 3, p 19)

During the June 4, 2015 appointment, claimant complained of ongoing discomfort in the right foot. Dr. Gorsche recommended claimant do sit down work only and ordered a CT scan. (Ex. 3, p. 21) According to Dr. Gorsche, the CT was unchanged but showed small ossicles at the anterior tip of the anterior process of the calcaneus. (Ex. 3, p. 23) Claimant continued to complain about pain, but mostly on the medial aspect of the foot. Dr. Gorsche noted a "fair amount" of atrophy of the right calf. (Ex. 3, p. 23)

Claimant consulted with Matthew Karam, M.D., for a second opinion. (Ex. 9) Claimant reported right anterior shin and dorsal foot numbness, ankle and heel pain along with limited ability to walk 30 minutes with the use of his cane. He has swelling of the right foot and lower leg. (Ex. 9, p. 1) He exhibited mild swelling of the right foot and

lower leg with diminished sensation over the right distal anterior tibia and dorsum of the foot. (Ex. 9, p. 2) Dr. Karam opined that there was no surgery that could "predictability improve his discomfort at this time. (Ex. 9, p. 3) Dr. Karam believed the right lower leg and foot swelling would get better but not return to normal. "He may continue to have some low-level foot discomfort [indefinitely]." Insoles and home exercise was recommended. (Ex. 9, p. 4)

He returned to Dr. Gorsche on August 11, 2015, with numbness and pain and swelling. Dr. Gorsche wrote:

> I have nothing else to offer him. He is going to work on work hardening and transition back to his job. He will see Dr. Gordon for that. He has reached maximum medical improvement. I will see him again p.r.n.

(Ex. 3, p. 26)

On September 2, 2015, defendant employer informed claimant that he was assigned a 19 percent lower extremity rating from Dr. Gorsche and therefore paid 41.8 weeks of permanent benefits. (Ex. E: 1) Dr. Gordon wanted claimant to return to work and released him without restrictions. (Ex. 7, p. 15)

> PLAN:
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> 1. I did discuss with patient today about returning back to work. The job that he owns is that of a mule driver. There is no contraindication of him returning back to this job based upon evaluation today and review of the job demands of a mule driver. It is of note, however, that he has not performed this job for over 7 months. With this taken into consideration, I do recommend a therapist supervised general body work conditioning program for 2 weeks. Afterwards, he is to transition to his job through a progression starting with 1-6-1 and then advance per protocol to full duty.

Claimant returned to work in September 2015 as a mule driver. On October 8, 2015, claimant testified he experienced increased low back pain while attempting to move a pallet. He was placed on light-duty work and sent to Dr. Gordon.

Claimant continued to complain of pain in the lower right extremity and the left foot. (Ex. 7, p 18) In November, Dr. Gordon saw claimant again. Dr. Gordon felt claimant was still at maximum medical improvement (MMI) for his lower extremity, but imposed new work restrictions, particularly for lumbar pain.

> PLAN:
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> 1. At this time, I recommend he continue with Voltaren 75 mg, one tablet twice daily. In addition, he may continue with Flexeril 10 mg, one tablet p.o. q.h.s.

2. With regards to therapy, will continue therapy two times a week for the next two weeks and then thereafter one time a week for two additional weeks.

3. With regards to work status, at this time, I recommend that he not lift greater than 25 lbs. or bend or twist at the waist greater than occasionally for two weeks.

(Ex. 7, p. 22) On December 2, 2015, Dr. Gordon discharged claimant without restrictions for the lower back pain. (Ex. 7, p. 25) Claimant attempted to return to work starting with one hour of work, six hours of sitting in one hour a standing work but was unable to complete his a shift. Claimant's last work day at defendant employer was December 3, 2015.

On December 3, 2015, claimant had returned to Dr. Bogdanic's office for follow up. He was having increased right foot pain. (Ex. 5, p. 8) Dr. Bogdanic gave him a work excuse. (Ex. 5, p 8)

He then consulted with Dr. Gordon.

1. Report of lumbosacral pain without radicular features. I had last evaluated him, with regards to his lumbosacral region, on 12/2/15. At that time, he was doing very well, and I discharged him. In addition, on his symptom diagram, on 12/2/15, he did not demark any symptoms of the lumbosacral region. He does report now that he has more notable symptoms of his complaints at this point, especially given that he has not worked per his report since 12/3/15. I would like to review the records with regards to the lumbar spine MRI.

2. Status post left foot surgical intervention by Dr. Delbridge on 2/22/16. Apparently, this was due to Lisfranc type of injury several years ago. He is still quite symptomatic in this regard.

3. History of right distal tibial fracture. Statis post right lower extremity tibial fracture – status post surgical intervention by Dr. Gorsche on 12/31/2014. He has been discharged in this regard previously by Dr. Gorsche and myself. However, does have an additional appointment scheduled with Dr. Gorsche in the next few days.

PLAN:

1. At this time, I would like to follow up with patient after I am able to review records and discuss his lumbosacral region in further detail.

2. With regards to his lumbosacral region, I did not place him on any restrictions as none were indicated today. Of note, he is not working currently due to his non-occupationally related left foot condition and pain.

(Ex. 7, p. 27)

On January 4, 2016, Dr. Bogdanic saw claimant again for various issues including tenderness over the spine and foot pain:

> Lumbago-has had problems in 2007 with a car accident in Florida and back pain went away however now lately is coming back possibly due to the fact that he is having a balance problems with walking due to painful right foot and also he has numbness in the lateral aspect of the right foot since fracture therefore I would send him to neurologist for evaluation of numbness hence neuropathy and evaluation of low back pain, he is unable to walk without assistance therefore I would given prescription for cane or crutches and also he is expecting next visit with orthopedic surgeon for opinion whether he would need to go through another surgery or not regarding his right ankle fracture.
>
> In the past has also fractured metatarsal Lisfranc fracture on the left foot and that will have to be addressed by orthopedic surgeon as well

(Ex. 5, p. 12) On January 5, 2016, claimant consulted with Ivo Bekavac, M.D., a neurologist, at the recommendation of Dr. Bogdanic. (Ex. 10) Claimant exhibited diminished pinprick involving the right distal lower as well as reduced reflexes. Dr. Bekavac ordered an MRI and EMG believing that the sensory loss was likely due to injury. (Ex. 10 p. 2)

An MRI of the lumbar spine performed on January 6, 2016 revealed small annular tears from L4 to S1 with mild degenerative changes in the posterior elements at those levels but there was no evidence of any radiculopathy. (Ex. 11, pp. 1-5) additional EMG test revealed no evidence of radiculopathy or myopathy. (Ex. 10, p. 3) Claimant was ordered to start physical massage therapy.

On January 11, 2016, defendant employer wrote to claimant and denied any future benefit payments due to a finding that he had reached MMI on December 2, 2015, without permanent impairment. (Ex. E, p. 3) The letter did not indicate what doctor had released claimant, but a review of the medical records indicate that the health professional was Dr. Gordon.

Claimant returned to Dr. Bekavac on February 17, 2016, reporting no improvement following the physical therapy. Because of an upcoming foot surgery, claimant did not want to go through additional therapy. (Ex. 10, p. 6)

On January 26, 2016, an MRI was completed of the left foot which showed moderate degenerative changes at the joint spaces between the navicular and the base of the 1 and 2 cunieforms. (Ex. 4, p. 13-14) He proceeded to have a fusion of the navicular cuneiform joints and removal of a spur from talus on March 1, 2016 with Arnold Delbridge, M.D. (Ex. 4 p. 15)

Claimant returned to Dr. Gorsche's office on June 2, 2016.

> Merim returns, information is through the interpreter, Jenny from Tyson is present. He had an open reduction internal fixation of the tibia December 31, 2014. He had persistent RIGHT foot pain. He was seen in Iowa City last summer and I saw the report. He also recently had nerve conduction studies done in February of this year which I have reviewed and the report as well. It has been about 18 months since his injury. He states he is using a crutch because of his LEFT foot injury. He has an old Lisfranc's injury to the mid foot on the LEFT side. Currently, he states he can drive for about 30 minutes or walk for about 40 minutes and that is unchanged. His main complaint is his great toe feels numb and causes him more problems. He did return to work after work hardening and work for about 3 months. He has not worked since December.
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> Plan
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> I discussed with him that I have nothing else to offer him. He had reached maximum medical improvement and remains at maximum medical improvement. There has been no new injury. I discussed with him that what he has he will have to learn to live with, I will see him again p.r.n. No change in his work status.

(Ex. 3, p. 28) A follow up visit took place with Dr. Gordon on June 8, 2016. During the visit, claimant was noted to be walking with an antalgic gait due to his left foot surgery and pain following that surgery. (Ex. 7, pp. 28-30) Upon examination, Dr. Gordon did not find any functional limitation of the lumbar region. Claimant was discharged with no work restrictions as it related to any work-related injuries. The defendants argue that the claimant's left foot pain and any conditions flowing from that left foot, are nonwork related.

Claimant returned to Dr. Bekavac's office on November 9, 2016 with increased back pain going into the lower extremities, more pronounced on the right. (Ex. 10, p. 7) Dr. Bekavac ordered a new MRI and new EMG. (Ex. 10, p. 7) There was some worsening in the lumbosacral motor radiculopathy and/or myopathy along with both lower extremities remarkable for sensorimotor polyneuropathy probably superimposed right tibial neuropathy. (Ex. 10, p. 8) Additionally, there was evidence of multilevel disc disease, as well as, disc bulging at the L5 – S1 level on the left side. (Ex. 10, p. 12) Physical massage therapy was ordered along with a metabolic workup for neuropathy. (Ex. 10, p. 12)

On January 4, 2017, Dr. Delbridge agreed with the rating assigned by Dr. Gorsche and opined that the claimant has sustained only a temporary exacerbation of his underlying degenerative low back condition which return to baseline without residual impairment. (Ex. 12, pp. 21 to 23)

On February 2, 2017, defendant employer wrote a warning letter that the claimant's FMLA was expiring and that future medical documentation needed to be provided in order to maintain his job. (Ex. E, p. 4)

On August 19, 2016, claimant underwent an independent medical examination with Sunil Bansal, M.D. Dr. Bansal recorded claimant's current physical condition as follows:

> Mr. Rakanovic continues to have pain in his right leg with standing and placing pressure on his right foot. He walks on the ball of his foot to keep from having increased pain in his right heel. His first and second toes have not been addressed, but he cannot spread them. He has hypersensitivity of his foot, as well as redness if he walks for a long time. His right foot feels cold. He is able to walk with a crutch. He can stand for about three minutes. With use of a crutch for his right lower extremity, he has pain in his back. He has consistent left foot pain with very limited range of motion and in ability to bear weight on it for more than a few minutes. He states that as a result of the October 2015 injury at work, he continues to have low back pain that radiates down the back of his left leg to his foot. Lifting is difficult for him, and he states that "every bone hurts." He has pain in his back from sitting for long periods.

(Ex. 15, p. 17) Dr. Bansal concluded that claimant sustained a right lower extremity injury and an exacerbation of a pre-existing low back condition as a result of his work-related activities. Dr. Bansal agreed that claimant's maximum medical improvement date was August 11, 2015 for the December 3, 2014 injury and that his back injury would be at MMI on January 8, 2016, at his last appointment with Dr. Bekavac. (Ex. 15 p 22) Dr. Bansal assigned a 22 percent lower extremity impairment for the right leg and 5 percent whole person impairment for the back. (Ex. 15, p. 23)

Dr. Bansal also determined the claimant had injury to his left lower extremity which continues to cause claimant pain, discomfort and disability. For the left lower extremity, he assessed 11 percent impairment. (Ex. 15, p. 23)

He imposed the following restrictions:

> I would place a restriction of no lifting over 5 pounds occasionally. Given his bilateral feet condition, he does not have the stability or pivot strength to lift more on a practical basis.

No frequent bending or twisting.

Standing and walking as tolerated. Being in any one position for too long causes him discomfort. Specifically, he should standing [sic] for more than 15 minutes, and no walking more than 15 minutes at a time with his crutch/cane.

Avoid steps, stairs, or ladders.

Avoid uneven terrain.

Continue to use a crutch/cane to prevent falling.

(Ex. 15, p. 24)

Since the surgery in 2015, claimant has had to use a cane and a walker. He still receives treatment for his back and believes that his right foot injury has affected his back pain. He currently takes oxycodone for the pain in his legs and back but continues to have significant pain while undergoing the daily activities of his life. Claimant does not believe he is able to perform any of the jobs that he held previously and that while he would like to return to full duty employment, he is doubtful whether that is possible.

CONCLUSIONS OF LAW

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 R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

There are multiple issues regarding claimant's work injury. Claimant asserts he is permanently and totally disabled as a result of his work-related injuries which include the lower right extremity crush injury and the low back injury. In the alternative, should the undersigned find that the low back injury was temporary, claimant asserts he is permanently and totally disabled and entitled to recovery from the Second Injury Fund of Iowa for the previous loss of use of the left foot.

Defendants have accepted that the claimant did sustain work-related injuries to both his lower right extremity and his low back. They argue the low back injury has no permanent disability and that the right extremity injury is a functional impairment limited to 19 percent as assigned by Dr. Gorsche.

The Fund argues that the claimant does not have a first qualifying injury because the left foot did not leave him an impaired state. Alternatively, the Fund argues that the claimant sustained a mental injury arising out of his work injuries and therefore does not have a first qualifying injury.

There is no expert witness evidence that ties claimant's mental state to either any work injury or to any disability that would inhibit his ability to work. Dr. Zdilar's notation in the record that the claimant's work injury "play a role" is not an opinion given to a reasonable degree of medical certainty. (Ex. 14, p. 14) While the claimant did have some mental health treatment during 2015 and 2016, that treatment was primarily for pre-existing conditions that claimant developed during his time in the war. Dr. Bansal made no connection between the mental issues and the work injuries as well. Even if claimant had developed a mental condition related to his work injuries, there was no expert testimony that tied to his mental condition to his inability to work. Dr. Zdilar opined on February 3, 2016 that there were no work restrictions arising out of a mental injury for the claimant. Therefore, it is found that there is no disability caused as a result of a mental injury.

File No. 5055533:

On December 30, 2014, claimant sustained a crush injury to his right lower extremity. He went through a period of treatment including surgery, casting, and physical therapy. On August 11, 2015, Dr. Gorsche determined claimant was at maximum medical improvement despite claimant's ongoing pain, numbness and swelling in the right lower extremity. Dr. Gorsche had no further medical care he could provide. Claimant was to continue with work hardening and transition into his full-time position. On September 2, 2015, claimant was assigned a 19 percent lower extremity rating by Dr. Gorsche. Following this, Dr. Gordon released claimant to work without restrictions believing that claimant's physical limitations would not prevent him from doing all of his job duties as a Mule Driver.

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).

Functional impairment ratings for the claimant's right lower extremity were 19 percent from Dr. Gorsche and 22 percent from Dr. Bansal. Dr. Delbridge agreed with

Dr. Gorsche's assessment. Claimant had pain, numbness, and swelling on an ongoing basis. Claimant is entitled to a 19 percent impairment of his right lower extremity.

Claimant asserts he is entitled to recover from the Fund.

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).

In July 2010, claimant fell at home resulting in a Lisfranc's injury to his left lower extremity. (Ex. 2, p. 1) He was advised he would need surgery but did not want to undergo the fusion at that time. He treated his condition with over-the-counter medications and rest. He eventually went on to have surgery in 2016. The Fund argues that claimant was asymptomatic prior to his 2016 injury. They point to Dr. Delbridge's medical record wherein he notes that claimant originally did not have pain in his left foot but developed pain following the right foot injury. (Ex. 12, p. 3) Claimant was reporting left foot pain in 2015 to Dr. Gordon and Dr. Bogdanic.

The Fund argues that the claimant sustained no industrial disability from the 2010 incident. He continued to do his position as a Mule Driver without issues. He had no further treatment until 2015. He had no permanent work restrictions as it related to his left foot injury and did not miss work as a result of this injury. Claimant testified credibly that he treated his left foot condition with over-the-counter medication. Objective test results showed that he was in need of a fusion surgery but claimant delayed that operation until the pain was too severe for him to tolerate it.

Therefore it is found claimant has sustained a first and second qualifying injury.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature

intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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. Claimant is currently nonweightbearing on the left. His right leg has pain, numbness, and swelling. He is unable to stand for more than short periods of time and cannot walk any significant distance.

He testified that he could not return to his previous positions. He has limited ability to speak, write, or read English which would be important for a sedentary position. He cannot drive for extended periods of time due to his back condition. He continues to take oxycodone and has difficulty with nearly every activity of daily living.

He has no relevant work experience in the sedentary field. While he has made little effort to look for new work, the evidence is scant that there is work available to him given his left and right lower extremity impairments.

It is found the claimant has sustained a permanent and total disability.

Claimant seeks reimbursement of medical expenses itemized in Exhibit 20. Those bills include treatment at Cedar Valley Medical Specialists, Dr. Bogdanic, and Wheaton Franciscan Healthcare/Covenant Medical Center.

These are unauthorized medical expenses and as such claimant must prove that these charges are "reasonable and beneficial under all the surrounding circumstances, including the reasonableness of the employer-provided care, and the reasonableness of the decision to abandon the care furnished by the employer in the absence of an order from the commissioner authorizing alternative care." Bell Bros. Heating & Air Conditioning v. Gwinn, 779 NW2d 193, 208 (Iowa 2010)

While Dr. Bogdanic and Dr. Bekavac treated claimant for his right lower extremity pain, and discomfort, most of the treatment in 2016 pertained to claimant's left foot and low back. Even if the treatment was causally related to the right foot injury, there's no showing that the treatment claimant received through Cedar Valley or Dr. Bogdanic's office was more efficacious than the treatment that was rendered to claimant via Dr.

Gordon or Dr. Gorsche, the two employer-authorized physicians, at that time. Claimant did not receive additional treatment, diagnostic testing, medications or therapy as it related to his lower right extremity from the non-authorized medical care. The treatment ordered and received post 2016 was related to claimant's back and lower left extremity.

Therefore claimant has failed to carry his burden that the unauthorized medical treatment was reasonable and beneficial in light of the care furnished by the defendants.

Additionally, claimant seeks the assessment of penalty benefits against defendants. Penalty benefits are awarded when "employer denies, delays, or terminates workers' compensation benefits without reasonable or probable cause or excuse." Iowa Code section 86.13(4)(a).

The argument advanced by the claimant in his brief pertains to the non-payment of healing period benefits from December 3, 2015, through January 8, 2016, arising out of claimant's low back issues. There is no evidence that claimant received late or improperly terminated compensation benefits arising out of the right lower extremity injury. Therefore, no penalty benefits are awarded.

Claimant seeks an assessment of costs and interest. The costs are itemized in exhibit 19. Defendants have paid only a partial amount of the Examination and Report of Dr. Bansal. IME examinations are reimbursable only under Iowa Code section 85.39. It is unknown what amount of Dr. Bansal's bill in Exhibit 19, page 25 is attributable to his examination versus his report. Claimant incorrectly states that an IME report is recoverable. The Supreme Court definitely stated that only examinations and not reports are reimbursable under section 85.39. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015).

> We conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

Id.

Defendants are responsible for only the examination portion of Dr. Bansal's fee.

The remainder of the costs, including the report of Dr. Delbridge, are appropriately assessed against defendants with half being paid by the employer and half by the second Injury Fund of Iowa pursuant to Iowa Administrative Code section 4.33.

File No. 5055534:

The parties agree claimant sustained an injury to his back, but disagree as to whether the injury caused any permanent disability.

Both Dr. Gorsche and Dr. Delbridge opine that the claimant's back injury did not result in permanent disability. Dr. Bansal's opinion differs but does not provide detailed causation explanation unlike the letters of Dr. Gorsche and Dr. Delbridge. The latter are given more weight. Dr. Delbridge wrote:

> His diagnosis of the lumbar spine is lumbar strain superimposed on degenerative changes of the spine with apparent recovery to previous status by December 2, 2016.
>
> Mr. Rakanovic has some complaints that are residual that he can't sit or walk a long time, but then his issue is complicated by his old injury from 2010 of Lisfranc injury of his left foot. My final conclusion is that his lumbar injury of 10-8-15 requires no additional treatment other than the possibility of an injection or short term physical therapy and home exercise. He has known degenerative changes and known limited range of motion of his spine, but it is doubtful that those particular problems were necessarily related to his injury of 10-8-15.

(Ex. 12, p. 23) Based on the expert testimony of Dr. Gorsche and Dr. Delbridge, it is found claimant sustained a temporary aggravation to a pre-existing back condition which return to baseline. Any lingering back pain is a result of the claimant's degenerative condition unrelated to his work.

The parties stipulated that claimant reached MMI for this back injury on October 9, 2015; however, claimant seeks additional temporary benefits for the time period of December 13, 2015, through January 8, 2016. During that time, claimant was off work due to his low back injury. Claimant contradicts his own stipulation by arguing that he was not at MMI until January 8, 2016, the date of MMI assigned by Dr. Bekavac. However, pursuant to both Dr. Gorsche and Dr. Delbridge, as well as, the stipulation of the parties, the claimant's MMI date was October 9, 2015. Any post October 9, 2015, lingering back problems are related to claimant's pre-existing condition and/or aggravation by the left lower extremity issues.

Claimant is therefore not entitled to additional healing period benefits. Claimant's penalty claim arises out of non payment of these additional healing period benefits. Given that no additional healing period benefits were appropriate, there is no finding that the claimant's benefits were untimely, late, or terminated inappropriately. No penalty benefits are awarded.

Claimant seeks reimbursement of medical expenses. While claimant did have a temporary aggravation of his back condition, the post October 9, 2015, issues arise out of personal health condition and not a work-related injury as previously discussed. Therefore, the medical expenses in Exhibit 20 are not awarded.

ORDER

THEREFORE, it is ordered:

File No. 5055533:

That defendant, Tyson Foods, is to pay unto claimant ninety-five (95) weeks of permanent partial disability benefits at the rate of four hundred fifty-eight and 85/100 dollars ($458.85) per week from August 20, 2015.

The Second Injury Fund of Iowa shall pay unto claimant permanent and total disability benefits pursuant to the Second Injury Compensation Act at the weekly benefit rate of four hundred fifty-eight and 85/100 dollars ($458.85) per week and said benefits shall commence at the conclusion of the permanency benefits owed to claimant from the Tyson Foods for the work injury of December 30, 2014.

That Tyson Foods shall pay accrued weekly benefits in a lump sum.

That Tyson Foods shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Interest accrues on unpaid Second Injury Fund benefits from the date of the decision.

That defendants are to be given credit for benefits previously paid.

That defendants shall share equally the costs of this matter pursuant to rule 876 IAC 4.33 as itemized in Exhibit 19 except for the charges of Dr. Bansal.

File No. 5055534

Claimant shall take nothing.

That each party shall pay their own costs associated with this file number.

Signed and filed this 24th day of May, 2017.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/kjw

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.