BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SEYDOU N. LOH, Claimant, vs. ALLSTEEL, INC., Employer, and ACE AMERICAN INSURANCE COMPANY, Insurance Carrier, SECOND INJURY FUND OF IOWA, Defendants.	File No. 5064253.01 ARBITRATION DECISION Head Note Nos.: 1402.40, 1802, 1803, 2501, 2502, 2907, 3202

STATEMENT OF THE CASE

Seydou Loh, claimant, filed a petition for arbitration against Allsteel, Inc., as the employer and Ace American Insurance Company as the insurance carrier. Mr. Loh also filed a claim against the Second Injury Fund of Iowa. These claims were consolidated for hearing, and this case came before the undersigned for an arbitration hearing on August 25, 2021.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall. All participants appeared remotely for the hearing.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual findings or legal conclusions relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 26 Claimant's Exhibits 1 through 2, as well as Defendants Exhibits A through E. All exhibits were received without objection.

Claimant testified on his own behalf. No other witnesses testified live at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. Their request was granted and all parties filed briefs simultaneously on October 5, 2021. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the claimant's right total knee replacement is causally related to the stipulated April 3, 2017 work injury.

2. The extent of claimant's entitlement to temporary total disability, or healing period benefits, if any.

3. The extent of claimant's entitlement to permanent partial disability benefits from the employer.

4. The proper commencement date for permanent partial disability benefits.

5. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses.

6. Whether claimant is entitled to reimbursement for his independent medical evaluation.

7. The extent of claimant's entitlement to Second Injury Fund benefits, if any.

8. The credit to which the Second Injury Fund is entitled.

9. The proper commencement date for any Second Injury Fund benefits.

10. Whether costs should be assessed against any party and, if so, in what amount.

FINDINGS OF FACT

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

Seydou Loh, claimant, is a 52-year-old man, who was born in Moratania and grew up in Senegal. His native language is French. However, Mr. Loh testified without the assistance of an interpreter. His English was not perfect, but he was able to understand questions posed and communicate effectively during his testimony.

Mr. Loh studied and received the equivalent of a high school degree in Senegal. He then attended a university in France, obtaining a bachelor's in law science. Unfortunately, these educational degrees do not transfer or provide him marketable skills in the United States.

Claimant moved to the United States in 2001 or 2002. He attended Muscatine Community College after his arrival to study English, as well as take business management classes. He did not obtain a degree through Muscatine Community College. Mr. Loh also took welding classes through Muscatine Community College, but he has never used the welding skills in a job or occupation.

From 1987 until 2001, claimant was self-employed. During this period of time, he purchased used clothing and sent it back to Africa for re-sale. He testified this was a profitable venture. He also testified this is a job that he could still perform in spite of his physical injuries.

In 2001 or 2002, after arriving in America, Mr. Loh took a job as a line inspector at Excell's meat packing facility in Illinois. Claimant testified this was a very physical position. He was required to fill-in at all of the meat packing line jobs when absences or needs arose. He testified that he stood continuously at this job during his eight-hour shifts. As a result of the stipulated April 3, 2017 right knee injury, Mr. Loh is likely not capable of returning to this work following his right knee injury.

In 2003, claimant quit working for Excel and began employment with Hon, subsequently known as Allsteel. Initially, claimant worked in an assembly job for Hon, assembling office furniture. He later transferred within the company and worked in a packaging position until 2009. Mr. Loh testified these positions required him to be able to lift up to 50 pounds, stand for an eight to nine hour shift, as well as bend and squat frequently. Once again, this is likely not a position to which claimant could return for future employment.

From 2010 until 2014, Mr. Loh took a position performing testing for Modine Manufacturing. He lifted 40-50 pounds performing a testing job and was required to lift and bend frequently in this position. Unfortunately, claimant sustained a right shoulder injury while performing his job duties for Modine Manufacturing. He required surgical intervention for his right shoulder and was not able to use the right shoulder after surgery. Claimant is not likely capable of returning to this position after his right knee injury.

Mr. Loh acknowledges he was assigned permanent restrictions after this shoulder injury. Medical records in evidence document that claimant submitted to surgical intervention of the right shoulder performed by James V. Nepola, M.D. Dr. Nepola opined that claimant sustained an 11 percent permanent functional impairment of the whole person as a result of his right shoulder injury. Dr. Nepola recommended claimant not lift greater than 15 pounds with the right arm and that he not reach more than 14 inches away from his body with the right arm. (Joint Ex. 2, p. 3) A functional capacity evaluation (FCE) was subsequently performed in November 2014. However, the FCE was deemed invalid due to inconsistent performance by claimant and a failure by claimant to give voluntary full effort as part of the FCE. Ultimately, the Modine Manufacturing plant closed and claimant was laid off.

In February 2017, claimant returned to an assembly position with AllSteel. When he returned to AllSteel, Mr. Loh secured upholstery on wood office products. He testified that he was required to bend and push up to 100 pounds in his upholstery position with AllSteel. Unfortunately, while performing his upholstery job duties at AllSteel on April 3, 2017, claimant sustained an admitted right knee injury when a loaded car fell onto Mr. Loh's right leg and knee.

As noted, defendants admitted the right knee injury and directed claimant for medical care. The initial medical records document symptoms in claimant's right knee, as well as his low back. Claimant concedes that his low back symptoms resolved. Unfortunately, the right knee symptoms continued to hamper claimant.

The initial diagnosis was a contusion and abrasion of the right knee. However, claimant's symptoms did not immediately respond to conservative care. Rhea Allen, M.D., the occupational medicine physician, ordered an MRI of claimant's right knee, which was performed on March 15, 2017. The MRI demonstrated lateral and medial meniscus tears in claimant's right knee. On March 19, 2017, the occupational medicine physician referred claimant to an orthopaedic surgeon. (Joint Ex. 4, p. 30) In a supplemental report, Dr. Allen opined that the April 3, 2017 work accident was sufficient and of proper mechanics to cause claimant's lateral and medial meniscus tears. (Joint Ex. 4, p. 33)

Suleman M. Hussain, M.D., an orthopaedic surgeon, evaluated claimant on June 21, 2017. He diagnosed a medial meniscus tear with right knee effusion and a partial tear of the quadriceps tendon in claimant's right leg. Dr. Hussain recommended surgical intervention and claimant consented to that surgical recommendation. (Joint Ex. 4, p. 41) Dr. Hussain took claimant to surgery on July 27, 2017 and performed a partial lateral and partial medial meniscectomy. (Joint Ex. 7, p. 63)

By January 2018, Dr. Hussain recommended and performed a right knee injection for osteoarthritis and opined that claimant would likely require a future right total knee replacement. However, Dr. Hussain opined that claimant achieved maximum medical improvement (MMI) on January 17, 2018. He released claimant to return to work without restriction after two weeks, only recommending claimant avoid using foot pedals more than half his work day for the first two weeks. (Joint Ex. 6, p. 46)

Unfortunately, claimant continued to experience symptoms in the right knee. On January 31, 2018, Dr. Hussain noted claimant had no lingering back pain. However, he recommended a repeat MRI and an EMG for claimant's ongoing right knee symptoms. (Joint Ex. 6, p. 47)

The repeat right knee MRI demonstrated quad tendinitis but no tear of that muscle or tendon. Unfortunately, the MRI also demonstrated progressive osteoarthritis with a moderate-size full-thickness cartilage defect in claimant's right knee. (Joint Ex. 6, p. 49) Dr. Hussain recommended claimant proceed with the right total knee

replacement. In spite of Dr. Hussain's earlier statement, claimant did not achieve MMI for his right knee injury prior to his right total knee replacement.

Defendants questioned the need for the right total knee replacement as well as the causal relationship of the right total knee replacement. They sent correspondence to Dr. Hussain requesting his opinion about whether the right total knee replacement was causally related to the April 3, 2017 work injury. Dr. Hussain opined that the recommended right total knee replacement was causally related to the work injury in April 2017. (Joint Ex. 6, p. 51)

Defendants did not accept the opinion of Dr. Hussain on this issue and denied liability for the right knee replacement. Instead, defendants scheduled and obtained an independent medical evaluation performed by another orthopaedic surgeon, Abdul Foad, M.D. Dr. Foad evaluated claimant on May 3, 2018. Dr. Foad opined that the April 2017 work injury was not a substantial contributing factor for claimant's degenerative knee changes. Therefore, he opined that no further care of the right knee was related to the work injury in April 2017. Instead, Dr. Foad declared that claimant achieved MMI for the right knee following the work injury. Nevertheless, claimant submitted to a right total knee replacement, performed by Dr. Hussain, on December 6, 2018. (Joint Ex. 9, pp. 72-74)

The parties stipulated that Mr. Loh was off work following his right knee replacement from December 6, 2018 through December 6, 2019. (Hearing Report) He remained under medical care and was not capable of performing substantially similar employment between December 6, 2018 and December 6, 2019.

Claimant sought an independent medical evaluation with Richard Kreiter, M.D., on July 23, 2019. Dr. Kreiter evaluated claimant once and determined that claimant achieved a "fair" result after the right total knee replacement. With respect to whether the right knee replacement was causally related to the work injury, Dr. Kreiter opined, "I do not believe the 04/03/2017 work accident was the direct cause for the right knee arthroplasty." (Joint Ex. 11, p. 83) However, Dr. Kreiter explained that the initial surgery performed by Dr. Hussain "evidently caused reaction in the knee with deterioration." (Joint Ex. 11, p. 83) In a supplemental report authored August 14, 2019, Dr. Kreiter elaborated, "The arthroscopic procedure accelerated the joint pathology and led to total knee replacement. Chondroplasty along with the quad/patellar pathology surgery accelerated the condition and the MRI which was done on 02/05/2018 showed rapid deterioration of the medial compartment." (Joint Ex. 11, p. 90) Accordingly, Dr. Kreiter opined, "the injury, treatment and surgery caused an acceleration of the joint to the point that total knee replacement was carried out for pain relief." (Joint Ex. 11, p. 90)

Although Dr. Kreiter opined that claimant was not at MMI when he evaluated claimant in July 2019, he offered a provisional rating. Specifically, Dr. Kreiter opined that claimant achieved a "fair" result as of the date of his evaluation, which entitled Mr. Loh to a 20 percent permanent functional impairment of the whole person as a result of

the right total knee replacement. He opined that claimant requires permanent restrictions for both of his knees and recommended claimant alternate sitting and standing. He also recommended claimant avoid squatting, kneeling, stairs, ladders, as well as rough, uneven ground. Dr. Kreiter opined that claimant not jump, avoid quick pivots on his right leg and use a cane for walking distances. (Joint Ex. 11, p. 84)

Dr. Hussain had not declared MMI for claimant's right knee by August 2019. Instead, Mr. Loh returned to Dr. Hussain's physician assistant on December 6, 2019. At that time, the physician assistant noted full range of motion of claimant's right knee, as well as five out of five strength in the right leg. The physician assistant documented that claimant reported he was "doing relatively okay." She released claimant from further care with claimant only to follow-up as needed with Dr. Hussain. (Joint Ex. 6, p. 54)

On August 20, 2020, claimant did return to Dr. Hussain's office. A different physician assistant evaluated claimant and documented that he felt a pop in his knee on August 14, 2020. (Joint Ex. 6, p. 57) Ultimately, however, Dr. Hussain declared claimant achieved MMI, concluded Mr. Loh achieved a good result from the right total knee replacement, and assigned him a 37 percent permanent impairment of the right lower extremity as a result of the right knee replacement. (Joint Ex. 6, p. 61)

Having considered the competing medical opinions, I accept the medical opinion of Dr. Hussain as the most credible and convincing in this evidentiary record. To the extent that Dr. Kreiter's opinion explains the acceleration of claimant's degenerative right knee changes, I find it to be convincing and supportive of Dr. Hussain's opinions. However, I did not find the opinions of Dr. Foad convincing in this situation.

Dr. Foad evaluated claimant once. Dr. Kreiter evaluated claimant once. Dr. Hussain, on the other hand, had the opportunity to evaluate claimant numerous times, including twice intra-operatively. Dr. Hussain had the opportunity to evaluate claimant on an ongoing basis and observe the degeneration in progress via diagnostic testing, clinical evaluation, and intra-operatively.

Moreover, Dr. Hussain's opinion is consistent with the timeline of events. Claimant did not have significant arthritic symptoms in the right knee prior to the injury at work. After the work injury, claimant required surgical intervention and subsequently developed significant arthritic changes quickly thereafter. Dr. Kreiter explained how the injury and surgery accelerated the degenerative process and clearly supports the causation opinion offered by Dr. Hussain. Dr. Hussain's opinion is entitled to significant weight and is found to be convincing and accurate. Therefore, I find that claimant proved the right total knee replacement is causally related to, or accelerated by, the April 3, 2017 work injury. To the extent that Dr. Kreiter's causation opinion supports and further explains the acceleration of claimant's degenerative arthritis caused by the work injury and initial surgery, it is also accepted.

Additionally, I find Dr. Hussain's opinions about MMI and permanent impairment to be credible, accurate and convincing. Again, Dr. Hussain had the opportunity to evaluate claimant over a course of care. His office did not release claimant at MMI until December 6, 2019. Dr. Kreiter concurred with this MMI date and I find that claimant achieved MMI on December 6, 2019.

With respect to permanent impairment, Dr. Kreiter offered a higher permanent impairment rating. However, Dr. Kreiter's evaluation occurred before MMI was achieved. Dr. Kreiter acknowledged that his impairment rating was a provisional rating. Reviewing the subsequent December 6, 2019 medical report from Dr. Hussain's office, however, it appears that claimant's right knee range of motion and perhaps also his strength improved between Dr. Kreiter's evaluation and the December 6, 2019 MMI date. While Dr. Kreiter's designation of a "fair" result from the knee replacement may have been appropriate in August 2019, it appears that claimant continued to improve through December 6, 2019.

Moreover, the restrictions outlined by Dr. Kreiter are significant. Claimant worked beyond those restrictions in subsequent employment. I find that the restrictions offered by Dr. Kreiter are likely too restrictive for claimant. Nevertheless, with a total knee replacement, claimant is not going to be capable of running, jumping, squatting, and heavy employment duties. Ultimately, I find that claimant achieved a good result, as opined by Dr. Hussain. I find that claimant proved he sustained a 37 percent permanent functional impairment of the right leg as a result of the work injury. He is likely not capable of returning to employment that requires significant, heavy lifting or jobs that require significant bending, squatting, walking long distances, or similar actions that would stress the right knee joint.

For purposes of the claim Mr. Loh asserts against the Second Injury Fund, the parties stipulate that claimant sustained a qualifying first injury. Specifically, the parties stipulate that Mr. Loh sustained a left leg injury on June 18, 2008 and that he has a seven percent permanent functional loss as a result of the June 18, 2008 left leg injury. (Hearing Report)

Having also determined that claimant sustained permanent functional impairment as a result of the second qualifying injury on April 3, 2017, I must determine the extent of claimant's industrial disability as a result of the combined effects of those two injuries. Although he sustained permanent functional impairment, claimant was capable of continuing to work unrestricted after the June 2008 left leg injury. While Dr. Kreiter opines that claimant requires restrictions for both legs, realistically, claimant worked without restrictions for his left leg between the June 2008 left leg injury and the April 2017 right leg injury. Claimant testified that his left knee does not bother him and that he was able to work without restrictions before the right knee injury.

Claimant also testified that his shoulder no longer bothers him in spite of previously referenced restrictions. Certainly, claimant was able to work heavy, manual labor jobs after the right shoulder injury.

I find that both the initial June 2008 injury and the April 2017 injury contribute and cause permanent disability. Claimant has permanent functional impairment for each knee following surgical intervention on each knee. He has ongoing right knee symptoms, including swelling of the right knee when he sits for extended periods. Claimant also experiences difficulties walking long distances and has a handicapped parking sticker. He uses over-the-counter medications for pain control of the right knee on a daily basis.

Although the Second Injury Fund accurately points out the prior shoulder restrictions, claimant credibly testified that his shoulder no longer bothers him and he has worked heavy jobs since the shoulder injury without restriction or ongoing difficulties. Considering claimant's age, his proximity to retirement, educational background, employment history, minimal language barrier, his motivation, ability to retrain, the length of his healing period, permanent impairment, permanent physical restrictions, and all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Loh has proven he sustained a 40 percent loss of future earning capacity as a result of the combined effects of the June 2008 left leg injury and the April 2017 right leg injury.

Mr. Loh also asserts a claim for healing period benefits. Specifically, claimant asserts a claim for healing period benefits from December 6, 2018 through December 6, 2019. Defendants disputed entitlement to the claimed healing period. However, the parties stipulate that claimant was off work during the claimed healing period. (Hearing Report) I find that claimant was unable to perform substantially similar work between December 6, 2018 and December 6, 2019. Claimant was released from care by the treating surgeon's office on December 6, 2019. I find that claimant achieved maximum medical improvement (MMI) on that date.

Mr. Loh seeks an award of past medical expenses. Review of the claimed expenses demonstrates they are for treatment of his right knee. Given that I have found all treatment, including the total right knee replacement are related to, or accelerated by, the April 3, 2017 work injury, I similarly find all of the claimed medical expenses in Joint Exhibits 12 through 20 to be causally related to the April 3, 2017 work injury. At the commencement of trial, defendants stipulated to all other issues related to the medical expenses and conceded those medical expenses would be owed if found to be related to the work injury. Defendants have already paid many of the expenses contained in Joint Exhibits 12-20. However, to the extent they have not been paid by the employer and insurance carrier, I find those medical expenses related to the April 3, 2017 work injury.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable

rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

The initial dispute between the parties is whether the December 6, 2018 right knee replacement is related to the April 3, 2017 work injury. In this case, I found the opinions of Dr. Hussain to be most convincing and credible. Accordingly, I accepted his opinion and found that claimant proved by a preponderance of the evidence that the right total knee replacement and all associated medical care and medical expenses were causally related to the April 3, 2017 work injury. Having reached this conclusion, I must determine claimant's entitlement to additional benefits.

Mr. Loh asserts a claim for healing period benefits from December 6, 2018 through December 6, 2019. December 6, 2018 represents the date claimant submitted to right total knee replacement. December 6, 2019 represents the date Dr. Hussain's office released claimant at MMI.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Defendants disputed liability for healing period benefits between December 6, 2018 and December 6, 2019. However, defendants stipulated claimant was off work during this period of time. (Hearing Report) Claimant did not return to work, and I found that claimant was not capable of performing substantially similar employment between December 6, 2018 and December 6, 2019. Therefore, claimant was entitled to healing period benefits until he achieved MMI on December 6, 2019. Iowa Code section 85.34(1). Having found this time period occurred after claimant's total knee replacement and having found the knee replacement causally related to the work injury, I conclude claimant is entitled to an award of healing period benefits from December 6, 2018 through his date of MMI on December 6, 2019. Iowa Code section 85.34(1).

Mr. Loh next asserts a claim for permanent disability benefits against the employer. This claim involves a stipulated injury to the right leg. As such, the parties appropriately stipulated that this is a scheduled member injury. (Hearing Report)

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).

I found that claimant sustained a 37 percent loss of function in his right leg as a result of the April 3, 2017 work injury. The Iowa legislature has established a 220-week schedule for leg injuries. Iowa Code section 85.34(2)(o) (2016). Claimant is entitled to an award of permanent partial disability benefits equivalent to the proportional loss of her leg. Iowa Code section 85.34(2)(v); Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969). Thirty-seven (37) percent of 220 weeks equals 81.4 weeks. Claimant is, therefore, entitled to an award of 81.4 weeks of permanent partial disability benefits against the employer. Iowa Code section 85.34(2)(o), (v).

The parties disputed the proper commencement date for permanent partial disability benefits. In this case, I awarded healing period benefits through December 6, 2019. Permanent disability benefits commence at the termination of the healing period. Iowa Code section 85.34(2). Having concluded that the healing period terminated on December 6, 2019, I further conclude that permanent partial disability benefits commence on December 7, 2019. Iowa Code section 85.34(2).

Claimant seeks award of past medical expenses in this case. Claimant details the past medical expenses sought in Joint Exhibits 12-20. Defendants stipulated to all issues relative to past medical expenses except whether the treatment was causally

related to the April 3, 2017 work injury. Having found the total knee replacement to be causally related to the work injury, I similarly found all of the treatment and expenses related to that treatment to be related to the work injury. Accordingly, I conclude that claimant is entitled to an order directing defendants to pay the disputed medical expenses (if they have not already done so), reimburse any third-party payer for those expenses, or to otherwise hold claimant harmless for those expenses. Iowa Code section 85.27.

Mr. Loh also seeks reimbursement of the independent medical evaluation charges from Dr. Kreiter. 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).

In this case, Dr. Kreiter performed his independent medical evaluation on July 23, 2019. (Joint Ex. 11, p. 83) At the time he performed the evaluation, Dr. Kreiter opined that claimant was not at MMI. Defendants obtained a subsequent permanent impairment rating from Dr. Hussain dated April 7, 2021. (Joint Ex. 6, p. 61) Claimant cannot establish that Dr. Kreiter's evaluation occurred after an evaluation of permanent disability performed by a physician selected by defendants. Therefore, claimant failed to establish the pre-requisites of Iowa Code section 85.39. I conclude that claimant failed to establish entitlement to reimbursement of Dr. Kreiter's evaluation pursuant to Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843 (Iowa 2015).

Mr. Loh also asserted a claim for benefits against 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); 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).

In this case, the parties stipulated that claimant sustained a qualifying first injury to his left leg in 2008. The parties also stipulated that the 2008 left leg injury resulted in 7 percent permanent impairment. Accordingly, I conclude that claimant established a qualifying first injury.

This second injury on April 3, 2017 is an admitted injury to the right leg. The parties stipulated that claimant sustained permanent disability. I found that claimant sustained a 37 percent permanent functional impairment as a result of the work injury. Accordingly, I conclude that claimant established a qualifying second injury for purposes of Second Injury Fund benefits. All three requirements of Iowa Code section 85.64 are met and claimant has established entitlement to benefits in some amount from the Second Injury Fund of Iowa. I must determine claimant's industrial disability present after the 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 Ry. Co. of Iowa, 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 shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995), Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergguist v.

MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmguist v. Volkswagen of America. Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, §§ 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae that can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Having found that claimant proved a 40 percent loss of future earning capacity as a result of the combined effects of the left leg and right leg injuries, I conclude that claimant established a 40 percent industrial disability. Industrial disability is compensated on a 500-week schedule. Iowa Code section 85.34(2)(u) (2016). Forty (40) percent of 500 weeks is 200 weeks.

However, the Second Injury Fund of Iowa is entitled to a credit against the 200 weeks for the permanent disability attributable to the first injury and for the permanent disability attributable to the second injury. Iowa Code section 85.64. As noted above, a leg is compensated on a 220-week schedule. Iowa Code section 85.34(2)(o). Accordingly, the stipulated seven percent impairment of the left leg is equivalent to 15.4 weeks of credit to which the Second Injury Fund is entitled for the first qualifying injury. I also awarded claimant 81.4 weeks of permanent disability against the employer to which the Second Injury Fund is also entitled to a credit.

In total, I conclude the Second Injury Fund is entitled to a credit of 96.8 weeks against the industrial disability award. Subtracting 96.8 weeks from the industrial disability award of 200 weeks results in an award against the Second Injury Fund totaling 103.2 weeks of benefits.

The Second Injury Fund's obligation for weekly benefits does not commence until its credit is exhausted. Having determined that the permanent partial disability benefits in the underlying claim against the employer commence on December 7, 2019, I conclude that the Second Injury Fund's credit (96.8 weeks) runs from December 7, 2019 through October 15, 2021. Second Injury Fund benefits commence on October 16, 2021 and shall be payable continuously until the Second Injury Fund satisfies its obligation of 103.2 weeks of benefits.

The final disputed issue is whether costs should be assessed against defendants. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant recovered an award of permanent disability benefits. I conclude it is appropriate to assess costs against the employer and insurance carrier in some amount.

Claimant seeks reimbursement of the cost of his filing fee ($100.00). This is a reasonable and permissible cost pursuant to 876 IAC 4.33(7). The filing fee will be assessed against the employer and insurance carrier.

Claimant also seeks assessment of the cost of his deposition ($47.25). Defendants elected to introduce Mr. Loh's deposition as Defendants' Exhibit D. I conclude it is, therefore, reasonable to assess the costs of obtaining a transcript of that deposition. Defendants will be ordered to reimburse Claimant's cost for his deposition transcript. Finally, claimant seeks assessment of the cost of Dr. Kreiter's IME. Agency rule 876 IAC 4.33(6) permits the assessment of the cost of obtaining no more than two doctors' reports. However, the Iowa Supreme Court has interpreted this rule and concluded that only the cost of a physician's report can be assessed as a cost under 876 IAC 4.33(6). In this case, Dr. Kreiter's billing statement does not delineate whether his charges are for his evaluation, time to review medical records, for his time related to drafting a report, or a combination of these tasks. Again, only the expense related to drafting a report in lieu of testifying at trial is taxable. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). I conclude that claimant failed to establish the cost of Dr. Kreiter's report. Therefore, I decline to assess any portion of Dr. Kreiter's fees under 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

The employer and insurance carrier shall pay claimant healing period benefits from December 6, 2018 through December 6, 2019.

The employer and insurance carrier shall pay claimant eighty-one point four (81.4) weeks of permanent partial disability benefits commencing on December 7, 2019.

The employer and insurance carrier are entitled to a credit against the award for any benefits previously paid for healing period during the period awarded or for permanent disability.

If additional weekly benefits are owed after the aforementioned credits are taken and applied, interest 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).

After all applicable credits are given, the Second Injury Fund of Iowa shall pay claimant one hundred three point two (103.2) weeks of benefits commencing on October 16, 2021.

All weekly benefits shall be payable at the stipulated rate of three hundred forty-five and 03/100 dollars ($345.03) per week.

To the extent they have not already done so, the employer and insurance carrier shall pay, reimburse any third-party payer, and otherwise hold claimant harmless for all past medical expenses detailed in Joint Exhibits 12 through 20.

The employer and insurance carrier shall reimburse claimant's costs in the amount of one hundred forty-seven and 25/100 dollars ($147.25).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 31st day of January, 2022.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Cady (via WCES)

Timothy Wegman (via WCES)

Amanda Rutherford (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.