BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM BAKER, Claimant, vs. MSC INDUSTRIAL DIRECT CO., Employer, and ACE AMERICAN INS. CO., Insurance Carrier, Defendants.	File No. 5063687 A P P E A L D E C I S I O N Head Notes: 1108.50; 1402.30; 1402.40; 1402.60; 1703,1802; 1803; 1804; 2501; 2701; 2907; 4100

Claimant William Baker appeals from an arbitration decision filed on July 31, 2020. Defendants MSC Industrial Direct Company, employer and its insurer, Ace American Insurance Company, respond to the appeal. The case was heard on March 9, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 24, 2020.

In the arbitration decision, the deputy commissioner found claimant failed to carry his burden of proof to establish the April 14, 2017, stipulated work injury caused permanent disability. The deputy commissioner also found claimant failed to prove he sustained permanent total disability from the work injury under both the traditional industrial disability analysis and the odd-lot doctrine. The deputy commissioner found claimant failed to prove entitlement to alternate medical care in the form of 24/7 supervision and ongoing medical treatment. The deputy commissioner found the medical care requested by claimant was not reasonable.

On appeal, claimant asserts the deputy commissioner erred in finding claimant failed to prove the April 14, 2017, stipulated work injury resulted in permanent disability. Claimant asserts the deputy commissioner erred in failing to find claimant permanently and totally disabled under either the traditional industrial disability analysis or under the odd-lot doctrine. Claimant asserts the deputy commissioner erred in finding claimant is not entitled to ongoing medical care. Claimant asserts the deputy commissioner erred in failing to award the requested alternate medical care.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the arbitration decision filed on July 31, 2020, is respectfully reversed. I provide the following findings, conclusions, and analysis for my decision:

The primary issue for consideration on appeal is whether claimant has proven he sustained permanent disability as a result of the April 14, 2017, work injury.

The arbitration decision provides a comprehensive review of claimant's extensive medical history. However, the arbitration decision provides very little analysis regarding whether claimant proved he sustained permanent disability as a result of the work injury. There is similarly very little discussion as to whether claimant's current cognitive and/or mental health issues are causally related to the work injury as asserted by claimant.

Claimant alleges he sustained permanent head and mental health injuries as a result of the work injury. Claimant's petition also asserts injuries to claimant's neck, back, left leg, right leg, right ankle, and fingers on the left hand. However, no physician opined any of those conditions resulted in permanent impairment or required permanent restrictions. Therefore, I find claimant failed to carry his burden to prove the neck, back, left leg, right leg, right ankle, and left hand injuries resulted in permanent disability.

Mr. Baker sustained the stipulated work injury on April 14, 2017. Defendants authorized medical treatment and provided care with a number of medical providers and specialists over the course of approximately three years. Claimant contends he sustained significant permanent disability, including permanent total disability, as a result of the injury.

I turn first to claimant's physical injuries. Mr. Baker alleges he sustained a concussion and/or a traumatic brain injury on April 14, 2017, the effects of which he asserts he still experiences today. Defendants assert claimant sustained a minor head injury, which resolved shortly after the injury. Defendants believe claimant's ongoing condition is psychogenic in nature and unrelated to the work injury.

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).

As noted by the deputy commissioner, there are conflicting medical opinions as to the cause of claimant's current conditions. Claimant relies upon the medical opinions of his authorized treating physiatrist, Farid Manshadi, M.D., his authorized treating psychiatrist, James Gallagher, M.D., his authorized treating neurologist, Marc Hines, M.D., and his authorized treating optometrist, DeAnn Fitzgerald, O.D. Defendants rely upon the independent medical opinions of Joseph Chen, M.D., Michael Cullen, M.D., Robert Jones, Ph.D., Randy Kardon, M.D., and Michael Kitchell, M.D.

When comparing the competing expert opinions, I note Drs. Cullen, Kardon, and Kitchell have never physically examined or seen claimant to understand the significance of his disabilities. I further note Drs. Chen and Jones conducted one-time evaluations of claimant for purposes of litigation, and those evaluations took place in November and December of 2019.

It is abundantly clear from the evidentiary record that the medical community has widely divergent opinions on concussions and traumatic brain injuries. Such injuries are often complex and can be difficult to diagnose. (See JE8, p. 138) For these reasons, it is difficult to afford any significant weight to the opinions of Drs. Cullen, Kardon, and Kitchell, who produced expert reports without ever observing claimant's condition. It is similarly difficult to afford significant weight to the opinions of Drs. Chen and Jones, who evaluated claimant on a one-time basis, when compared to the opinions of three, well-qualified authorized treating physicians who observed claimant on multiple occasions over a three-year period.

As an example, the deputy commissioner seemingly relied on the opinions of Dr. Kardon in finding claimant failed to prove the work injury was a cause of permanent disability. A significant problem with Dr. Kardon's report, however, is the fact his opinions stem from visual examinations and tests that he did not personally administer or even observe. Dr. Fitzgerald addressed this very issue in her rebuttal report, noting, "It is because of medical professionals that are not in the field seeing patients on a regular basis and in volume out in the field that give the general population the wrong information on diagnosis and management [of concussions/TBIs]." (JE8, p. 139)

Dr. Kardon's report largely focuses on the records and findings of Dr. Fitzgerald, while also commenting on traumatic brain injuries in general. Because Dr. Kardon did not personally examine claimant, his report contains a number of opinions that are vague and non-committal. Several of his opinions are couched in language that would lead one to believe they are definitive. However, those opinions do not address the underlying findings of Dr. Fitzgerald's records. For instance, Dr. Kardon's report

provides, "The eye movement recording and gaze tracking performed do not show pathology, in my opinion." (Ex. E, p. 19) Note, this is a comment on the testing itself, not Dr. Fitzgerald's findings. The report goes on to discredit the reliability of eye movement recording and gaze tracking in general by explaining such tests can be easily affected by a patient's lack of sleep, mood, fatigue, and pain. However, Dr. Kardon does not offer specific evidence that such factors played a role in claimant's results. Id. Dr. Kardon's report also provides, "My opinion is that the results of the testing of Mr. Baker do not specifically reveal cerebellar or parietal lobe dysfunction" with the qualification, "in the absence of neurological findings associated with dysfunction in these locations of the brain." (Ex. E, p. 20) Such an opinion is not equivalent to, "The results of Mr. Baker's testing do not reveal cerebellar or parietal lobe dysfunction."

While there is an apparent disparity in expert credentials between Dr. Fitzgerald and Dr. Kardon, it is clear from a review of Dr. Fitzgerald's curriculum vitae that she is well-versed in rehabilitating individuals with concussions and other traumatic brain injuries and she is qualified to speak on those issues. In 2008, she opened Cedar Rapids Vision in Motion, a visual rehabilitation clinic. (JE8, p. 134) At Vision in Motion, she sees specialty patients for traumatic brain injuries, strokes, and concussions. She is Credentialed ImPACT Consultant (CIC) certified. Dr. Fitzgerald is vice president of Neuro-Optometric Rehabilitation Association (NORA), and she has spoken about concussions, TBIs, and rehabilitation of those conditions at a number of conferences, including the Colorado Vision Summit, the Concussion Health Summit, the Ultimate Concussion Conference, and the Neuro-Optometric Rehabilitation Association Annual Conference. (JE8, p. 134)

It is important to point out that Dr. Fitzgerald is one part of a comprehensive rehabilitation plan that includes physical medicine and rehabilitation, neurological care, psychiatric care, and vestibular care. Her opinions are not included in the evidentiary record to prove a permanent loss of vision. Rather, her medical records and opinions speak to claimant's ongoing issues and demonstrate the continued need for vestibular rehabilitation therapy. For these reasons, and for reasons discussed below, I respectfully disagree with the deputy commissioner's finding that Dr. Kardon's expert medical opinions are more persuasive than the opinions of Dr. Fitzgerald.

Further undercutting the persuasiveness of defendants' expert reports is the fact they lack a general consensus on the issue of whether claimant sustained a concussion or a traumatic brain injury on April 14, 2017.

The reports of Drs. Kardon and Kitchell cast doubt on, but do not specifically rule out, the possibility that claimant sustained a concussion or traumatic brain injury on the date of injury. Dr. Kardon opined that although Mr. Baker did not suffer a loss of consciousness or objective signs of neurologic dysfunction immediately following the incident, the presence of a headache met some experts' broad definition of a mild traumatic brain injury. (Ex. E, p. 19) Dr. Kitchell is of the opinion that claimant sustained only a minor head injury on the date of injury, and Dr. Kitchell believes it would be difficult to determine whether claimant sustained a minor concussion. (Ex. A, pp. 2-3)

In contrast, Drs. Chen, Cullen, and Jones cite to the contemporaneous medical records to find claimant did not sustain a concussion or traumatic brain injury. (See Ex. D, p. 13; Ex. F, p. 29, Ex. O, p. 74)

Dr. Jones opined, in part, "Of importance in this conclusion are the contemporaneous medical records, which found no evidence of confusion, disorientation, or difficulties with cognition that might reflect a concussion." (Ex. D, p. 13)

Similarly, Dr. Cullen opined, "Concurrent descriptions failed to identify convincing evidence of a traumatic brain injury/concussion although with evolving complaints, he was offered this diagnosis." (Ex. F, p. 29) Dr. Cullen further opined, "There is no convincing evidence that Mr. Baker experienced a concussion/traumatic brain injury. He did experience blunt trauma to the base of the skull and other areas as described." (Ex. F, p. 29)

Dr. Chen is of the opinion that claimant sustained minimal trauma to his head and neck on the date of injury. (Ex. O, p. 74) Dr. Chen was unable to establish a diagnosis of traumatic brain injury because claimant's contemporaneous medical records on the date of injury indicated no suspicion for loss of consciousness or neurological symptoms. Id.

These three physicians do not appear to have a firm understanding of the contemporaneous medical records. Contrary to Dr. Jones' opinion, the contemporaneous medical records reflect claimant was complaining of disorientation and difficulties with cognition shortly after the work injury. Claimant consistently reported he did not feel like himself while filling out paperwork for defendant-employer. (See JE3, p. 15) Claimant presented with complaints of headaches, neck and upper back pain, nausea, vomiting, tiredness, and issues with memory within 72 hours of the injury. (See Ex. N, p. 62b) Moreover, statements made by claimant to his co-workers in the hours and days following the work injury reflect contemporaneous complaints of cognitive difficulties. (Ex. 27, pp. 127-128) There is no indication defendants' experts were provided copies of claimant's contemporaneous statements.

Dr. Chen's opinion is similarly discredited by contemporaneous medical records and text messages claimant sent to agents of his employer on or about the date of injury asserting neurological symptoms. (See JE2, p. 10; see also Ex. 27, p. 127) Further calling Dr. Chen's opinions into question is the report of defense expert Dr. Kardon. When asked whether Mr. Baker – based solely on his emergency room records – suffered a traumatic brain injury on April 14, 2017, Dr. Kardon conceded that, "the presence of headache following blunt head trauma meets some experts' broad definition of mild traumatic brain injury." (Ex. E, p. 18) Dr. Kardon did not rule out a concussion or traumatic brain injury as a condition claimant sustained on the date of injury. (Ex. E, p. 19)

Dr. Cullen's assertion that claimant was offered the diagnosis of a brain injury/concussion only after his complaints evolved is similarly inaccurate. After examining claimant in the emergency room on the date of injury, Dr. Curnes expressly suggested that claimant may have sustained a mild concussion. (JE2, p. 10) The

diagnosis was definitively assigned two days later, when claimant's symptoms progressed. (See Ex. N, p. 62b; see also JE2, p. 11)

Defendants' argument stresses that claimant did not report symptoms consistent with a head injury at his initial emergency room visit, while ignoring or minimizing the complaints claimant described over the subsequent 48 hours. In this regard, defendants urge an unrealistically narrow interpretation of the term "contemporaneous." Such an interpretation is unreasonably restrictive and would not provide a reliable or representative understanding of claimant's condition following the work injury. As noted above, the emergency room physician documented the possibility of a concussion, and complaints of cognitive difficulties were reported within 72 hours of the injury. It is difficult to fathom an interpretation of these initial medical records as anything other than contemporaneous, particularly in light of the concussion/traumatic brain injury information in the evidentiary record. (See JE8, p. 137-138)

While the deputy commissioner noted several concerns, he ultimately found claimant to be a credible witness. The deputy commissioner's credibility assessment was based upon his review of the evidentiary record and not upon any personal observations of claimant or his demeanor. I find the deputy commissioner correctly assessed the credibility of claimant. This finding of credibility lends credence to claimant's testimony regarding his symptoms in the hours and days that followed the work injury.

The evidentiary record contains a discussion of concussions and traumatic brain injuries with citations to the Centers for Disease Control and Prevention (CDC). (See JE8, pp. 137-138) The evidentiary record provides that a traumatic brain injury results when an external force injures the brain and is a major cause of death or disability. (JE8, p. 145) It is noted that TBIs can cause physical, cognitive, social, emotional, and behavioral effects and prognosis can be unpredictable, ranging from complete recovery to permanent disability or death. Id. The record further explains that a concussion is a type of traumatic brain injury, or TBI, that is caused by a bump, blow, or jolt to the head or by a hit to the body that causes the head and brain to move rapidly back and forth. This sudden movement can cause the brain to bounce around or twist within the skull, creating chemical changes in the brain and sometimes stretching and damaging brain cells. (JE8, p. 137) While the evidence suggests that symptoms generally appear soon after the injury, it is noted that some symptoms may not present themselves for hours or days. (JE8, p. 138)

With this information in mind, the suggestion that claimant's contemporaneous medical records do not justify a diagnosis of a concussion or traumatic brain injury defies logic.

When the evidentiary record is viewed in its entirety, I find the opinions of Dr. Manshadi, Dr. Gallagher, and Dr. Fitzgerald to be more persuasive than those of Drs. Chen, Cullen, Jones, and Kitchell with respect to claimant's traumatic brain injury. As claimant's long-time treating physicians, Drs. Manshadi, Gallagher, and Fitzgerald are more familiar with claimant's condition than physicians who either did not examine

claimant, or only examined claimant on a one-time basis for purposes of litigation. As such, I reverse the deputy commissioner's finding that the opinions of Drs. Chen, Cullen, Jones, Kitchell, and Konrad are entitled to the greatest weight. I find claimant carried his burden of proof to establish he sustained permanent injury to his head. I further find claimant carried his burden of proof to establish his current condition is causally related to the stipulated April 14, 2017, work injury.

With respect to claimant's mental health conditions, claimant relies on the medical reports and opinions of his authorized treating psychiatrist, Dr. Gallagher. Defendants did not obtain a rebuttal psychological or psychiatric evaluation of claimant. However, several defense experts diagnosed claimant with severe anxiety and depression or discussed a psychological component to claimant's current condition. (See Ex. O, p. 74; Ex. A, p. 5; Ex. D, p. 13)

As a psychiatrist, Dr. Gallagher is the only physician in the evidentiary record uniquely qualified to diagnose and opine on claimant's mental health conditions. (See JE19, p. 302) Since his first visit with claimant on August 28, 2018, Dr. Gallagher has consistently diagnosed claimant with a head injury, depression, and anxiety. Dr. Gallagher causally relates these conditions to the April 14, 2017, work injury.

Dr. Gallagher has reviewed all expert opinions in this matter. The expert reports of Drs. Chen, Cullen, Jones, and Kitchell did not change Dr. Gallagher's causation opinion. (JE19, pp. 357, 357.2) In his final report, Dr. Gallagher states:

> I don't see any other causes for the onset of anxiety or depression have been cited or suggested. Similarly, the only trigger that I can find for his anxious and depressive state is the injury incurred at work, as he doesn't have any previous history of severe anxious or depressive disorders. There was a time when his life was stressful from a family vantage point, but it pales in comparison to the enduring nature of this problem and his current predicament.

(JE19, p. 357.1)

Dr. Gallagher's medical records and reports are well-reasoned and thorough. His opinions are reasonable and consistent with the evidentiary record as a whole. Given the complexity of claimant's mental health condition, I find the opinions of a psychiatrist are entitled to greater weight than the opinions of occupational physicians, neuropsychologists, neurologists, and physiatrists. I find the opinions of Dr. Gallagher to be the most persuasive and credible as they relate to claimant's anxiety and depression. I accept the opinions of Dr. Gallagher and expressly find claimant carried his burden of proof to establish the work injury caused or materially aggravated, accelerated, or lit up claimant's pre-existing conditions of anxiety and depression.

Having found claimant's current head and mental health conditions are causally connected to the work injury, I find claimant has proven by a preponderance of the evidence that his current condition remains compensable as a work injury.

Claimant seeks an award of ongoing medical treatment with Drs. Manshadi, Gallagher, and Fitzgerald. Dr. Manshadi and Dr. Gallagher have opined claimant requires ongoing neurological care, vestibular care, psychotherapy, prescription medications, botox injections, use of Brain Tap software, and a cryohelmet. (JE6, p. 113; JE19, pp. 313, 341-343; JE8, p. 132)

Claimant also seeks restoration of his 24-hour supervision as recommended by Drs. Manshadi, Gallagher, and Fitzgerald. Claimant's treating physicians relate his need for 24-hour supervision to his sporadic, seizure-like episodes and odd behaviors. (See JE6, pp. 42-43, 108, 113) Claimant is requesting supervision from March 1, 2020, until such time as the authorized treating physicians determine supervision is no longer required. Claimant makes no request for his fiancé, Ms. Hestness, to be assigned the role of supervisor.

Iowa Code section 85.27 provides in pertinent part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances....

Having accepted the medical opinions and recommendations of Dr. Manshadi, Dr. Gallagher, and Dr. Fitzgerald, I find claimant has proven entitlement to ongoing medical care, including restoration of claimant's 24-hour supervision. Defendants are responsible for providing all reasonable and necessary treatment related to the work injury.

Claimant asserts the person or persons supervising him up until the time defendants assume supervision responsibilities should be compensated for their services between February 24, 2020, and the date of this appeal decision. I agree. For obvious reasons, the evidentiary record does not provide what, if any, supervision services claimant has received since February 24, 2020. Presumably, Ms. Hestness has continued in this role. If this is the case, defendants will be ordered to compensate Ms. Hestness. If claimant has obtained alternative supervision, defendants will be instructed to pay for the reasonable expenses associated with such care.

Claimant further asserts Ms. Hestness should be compensated for the supervision services she has provided claimant since the date of injury. Claimant relies on Dr. Manshadi's July 30, 2018, letter stating the recommendation that 24/7 supervision has been needed since the April 14, 2017, date of injury. (See JE6, p. 79) Defendants assert Ms. Hestness should only be entitled to compensation for the supervision services she has provided since July 30, 2018, the date Dr. Manshadi first recommended that Ms. Hestness be claimant's caregiver. (JE6, p. 79) Defendants attempted to arrange around-the-clock supervision for claimant prior to Dr. Manshadi's

July 30, 2018, letter; however, claimant and Ms. Hestness refused the offers of care. (See Ex. H, pp. 38-39; Ex. R, pp. 102-116)

Claimant specifically asserts Ms. Hestness should be compensated based on the local value of services provided. (Claimant's Appeal Brief, pp. 31-32) Claimant bears the burden of proof regarding the rate of compensation for nursing or supervision services. See Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 156 (Iowa 1996)

Prior to the arbitration decision, defendants paid Ms. Hestness $600.00 per week for supervision services under Iowa Code section 85.27 between July 30, 2018, and February 24, 2020. (See Ex. I, p. 43; Ex. Q, pp. 97-101) The calculation for the $600.00 figure is not provided in the evidentiary record. However, it is noted that the $600.00 represents five days of service. (Ex. I, p. 43) Defendants' letter states they were only paying five days per week because if Ms. Hestness was employed full-time, she would be home two days out of every week. Defendants provide no legal justification for their position.

Home Instead Senior Care, one of the home health agencies defendants contacted, estimated claimant's supervision would cost $320.00 per day, or $20.00 per hour for 16 hours per day. (Ex. S, p. 120, Depo., p. 14)

Shelly Kinney, a life care planner, addressed the costs associated with 24/7 care. (Ex. 17, p. 63) Based on Ms. Kinney's knowledge and expertise, she used an hourly rate of $14.61 for a nursing assistant or home care attendant in the Des Moines area. (Ex. 17, p. 63) At $14.61 per hour, around-the-clock care amounts to $2,454.48 per week.

Determining the rate of compensation for home nursing services using the local value of the service provided, and not the amount of the wage paid to a certified nurse aid, is the valuation method endorsed by our supreme court in Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 156 (Iowa 1996) (determining that the claimant carried his burden of establishing a reasonable compensation rate for the home nursing services provided by his wife, who was not a nurse, by presenting evidence obtained from "home nursing services in the area as to what would be charged if the same services were performed by a nurse.")

While the undersigned questions whether Ms. Hestness has provided as much assistance as a typical nursing assistant or home care attendant, there is a standing recommendation for 24/7 supervision from both Dr. Manshadi and Dr. Gallagher. Dr. Manshadi has opined that Ms. Hestness is a reasonable option for 24/7 supervision as she understands and knows Mr. Baker's medical history. Defendants presented no evidence to support an amount of supervision services less than the figures provided by Ms. Kinney. In fact, Ms. Kinney's projections are less than the amount provided by Home Instead Senior Care. (Ex. S, p. 120, Depo., p. 14) As such, I accept Ms. Kinney's calculations as reasonable. Defendants shall compensate Ms. Hestness for the supervision services she has provided since July 30, 2018, less credit for amounts previously paid.

The last issue to be addressed on appeal is the extent of claimant's permanent impairment. Claimant asserts he is permanently and totally disabled under both the traditional industrial disability analysis and the odd-lot doctrine. Claimant has introduced the medical opinions noted in the arbitration decision as well as a vocational opinion from Phil Davis in support of his claim for permanent total disability or odd-lot status.

A claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010) Stabilization of the employee's condition is the event that allows a physician to make the determination that a particular medical condition is permanent. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa App. 2012) (quoting Bell Bros. Heating, 779 N.W.2d at 200) If the employee has a permanent disability, then payments made prior to permanency are healing period benefits. Id. If the injury has not resulted in a permanent disability, then the employee may be awarded temporary total benefits. Id. at 556-57.

Iowa Code section 85.34(1) governs healing period benefits, as follows:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

As noted by claimant's treating physicians, claimant is significantly impaired by his poor mental functioning. He has issues with his memory, including remembering to take his medications. Mrs. Hestness has assumed all responsibilities with regard to paying bills, budgeting, financing, and other necessary tasks. Physically, claimant is able to perform activities of daily living without assistance. (See Ex. 17, p. 52) However, he continues to experience episodes of seizure-like activity, moments of blacking out, blank stares, unresponsiveness, flickering eyes, and odd behaviors. The medical records indicate such episodes have decreased both quantitatively and qualitatively since their initial onset.

Dr. Gallagher's medical records reveal claimant has a strong desire to improve his condition and gain independence. (JE19, p. 324) Claimant and Dr. Gallagher have spent, "quite a bit of time talking about pathways that might improve his functionality and possibly enhance independence" (JE19, p. 338) However, according to Dr. Gallagher, claimant, "will tend to deny that he is limited, and we have to keep that in mind" when deciding how hard to push claimant towards independence. (See JE19, p. 347)

Dr. Manshadi opined claimant is unable to drive or be gainfully employed as a result of the work injury. Dr. Manshadi further opined claimant requires ongoing

psychiatric care, vestibular care, neurological care, and care with a physical medicine and rehabilitation doctor. Lastly, Dr. Manshadi opined claimant requires 24-hour supervision due to the work injury. (JE6, pp. 108-110, 113) From a psychiatric standpoint, Dr. Gallagher similarly opined claimant is not employable in his current state, he cannot drive, and he requires 24-hour supervision. (JE19, p. 343)

In his September 4, 2019, medical record, Dr. Manshadi placed claimant at maximum medical improvement for his head injury. According to Dr. Manshadi, this included claimant's issues with concussive headaches, chronic migraines, myofascial pain in the neck and back, seizures, peripheral vision, left-sided weakness, and loss of sensation. Dr. Manshadi did not place claimant at MMI for his severe anxiety and depression. Dr. Gallagher has not expressly placed claimant at MMI for his severe anxiety and depression.

Dr. Gallagher's medical records and reports have consistently noted improvements in claimant's mental health conditions since approximately July, 2020. On July 20, 2019, Dr. Gallagher stated:

> Bill clearly finds it helpful to come here to discuss planning, and especially the extended time since he comes from such a distance. I will continue this given that it seems useful and I don't know of any other way to find his eventual capabilities or, conversely, his limitations and restrictions. He is a very talented man, obviously, and maybe that former resiliency and adaptability can help to get him through the maze of recovery, so to speak.

(JE19, p. 338)

The evidentiary record notes that claimant moved to the Des Moines, Iowa, area shortly after the July 20, 2019, appointment. Dr. Gallagher strongly encouraged such a move because a bigger city would provide greater opportunities for claimant. (JE19, p. 344) According to Dr. Gallagher, those greater opportunities included "future job opportunities, maybe" and stimulating activities. Id. The move turned out to be "very good" for claimant's mental health. (See JE19, p. 346) Dr. Gallagher's medical records reflect claimant's mood consistently improved between September 2019 and February 2020. (See JE19, pp. 341-357) It is noted that claimant, "is very intelligent and curious and coming here [to Des Moines] provides a considerable amount of psychological sustenance for him, which has been lacking." (JE19, p. 349) By October 23, 2019, claimant was looking into volunteer opportunities and connecting with like-minded individuals interested in music. (JE19, pp. 346, 350) In January of 2020, claimant and his fiancée joined the YMCA. Dr. Gallagher was encouraged by this and felt exercise and other activities available through a YMCA membership would be beneficial for claimant. (JE19, p. 352) Around this same time, claimant began playing his guitar again, albeit with limited success. (See JE19, pp. 352, 354)

Dr. Gallagher's records reflect consistent, although slow, improvements in claimant's mental health conditions. Dr. Gallagher's goal remains to increase claimant's self-sufficiency as much as possible. (See JE19, pp. 348, 350) The current record does

not support a finding that claimant has reached MMI with respect to his severe anxiety and depression.

I find claimant is not yet at maximum medical improvement and I find he requires further medical treatment for his mental health conditions. I find that the claim for permanent disability is not ripe for determination at this time. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010) Claimant is entitled to a running award of healing period benefits from April 14, 2017, until such time as he reaches maximum medical improvement.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on July 20, 2020, is reversed.

Defendants shall pay claimant running healing period benefits from April 14, 2017, at the rate of four hundred forty-six and 06/100 dollars ($446.06) per week, until such time as those benefits shall cease pursuant to Iowa Code section 85.34.

Defendants shall receive credit for all weekly benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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).

Defendants remain liable for any reasonable, necessary and causally related medical care for claimant's head and mental health injuries into the future.

Defendants shall restore claimant's 24-hour supervision as recommended by claimant's treating physicians. Defendants maintain control over the selection of the supervision provider.

Defendants shall compensate claimant's supervisor for the 24/7 supervision services provided since July 30, 2018, less credit for amounts previously paid, at the hourly rate of fourteen and 61/100 dollars ($14.61).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 17th day of March, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Randall Schueller (via WCES)

Jean Dickson (via WCES)