

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRETT SULLIVAN,

Claimant,

vs.

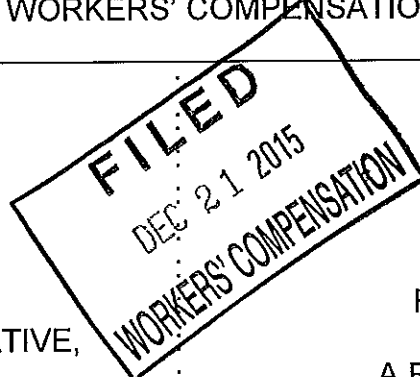
WEST CENTRAL COOPERATIVE,

Employer,

and

FARMLAND MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.



File No. 5050594

ARBITRATION

DECISION

Head Note Nos.: 1801, 1803,
3000, 4000.2

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Brett Sullivan, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on July 9, 2014. Claimant alleged he sustained a work-related injury on October 2, 2011. (Original notice and petition)

West Central Cooperative, and its workers' compensation insurance carrier, Farmland Mutual Insurance Co., filed their answer on July 30, 2014. They admitted the occurrence of the work injury. A first report of injury was filed on October 10, 2011.

The hearing administrator scheduled the case for hearing on June 3, 2015 at 1:00 p.m. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Dina Dulaney, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Ms. April Sullivan also testified for claimant. Defendants elected not to call any witnesses to testify at the hearing.

The parties offered numerous exhibits. Claimant offered exhibits marked 1 through 16. Defendants offered exhibits marked A through S. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on August 14, 2015. The case was deemed fully submitted on that date.

STIPULATIONS

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

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on October 2, 2011 which arose out of and in the course of his employment;
3. The injury resulted in both temporary and permanent disability;
4. Claimant is entitled to temporary healing period benefits for the following periods:
10/3/2011 through 11/19/2011
1/19/2012 through 2/4/2012
8/10/2012 through 9/9/2012;
5. Defendants have withdrawn any affirmative defenses they may have had available; and
6. Medical benefits are no longer in dispute.

ISSUES

The issues presented are:

1. What is the proper weekly benefit rate to use?
2. What is the extent of claimant's permanent disability?
3. Does claimant suffer from a mental illness or from PTSD?
4. What is the credit to which defendants are allowed to take?
5. What are the costs, if any, related to requests for admissions? And;
6. What and to whom shall costs be taxed?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

Claimant is 35 years old and left-hand dominant. He was diagnosed with diabetes mellitus in 1996. He is insulin dependent. Claimant has two minor children.

Currently he resides with April Sullivan and their child in the Village of Grand Pass, Missouri. The village has a population of 66 residents and is located in Saline County, Missouri. Claimant owns a woodworking shop in Grand Pass where he refinishes antique furniture and makes wine racks.

Claimant married April Sullivan in February of 2003. They had one child together. Claimant and April formally divorced in Missouri on June 10, 2011. Physical custody of the minor child was awarded to April who resided in Kansas with the child. There was a child support order in effect whereby claimant was ordered to pay child support to April for their child.

With respect to his income taxes, claimant and April filed joint/married income tax returns in 2009 and 2010. In 2011, claimant filed a single return with no dependents. (Exhibit P) Claimant also filed as a single person in 2011 for a tax refund from the State of Kansas. (Ex. P) In 2012 and 2013, claimant filed head of household with one dependent. (Ex. P) On his 2011 W-4, claimant checked married with one exemption.

Claimant commenced employment with West Central Cooperative effective September 13, 2011. He was hired as an Operations Superintendent earning \$2,942.32 bi-weekly. (Ex. M, page 137) A job description was provided in Exhibit 13. It is adopted as though fully set out in the body of this decision.

A Notice of Income Withholding was sent to West Central Cooperative from the Clerk of the Circuit Court of Saline County, Missouri on September 28, 2011. The cooperative was ordered to withhold \$207.70 per bi-weekly pay period for child support from claimant's wages. The money was forwarded to the Family Support Payment Center in Jefferson City, Missouri. (Ex. N, pp. 139-140) The child support order was not removed until after the work injury occurred.

Claimant relocated to Iowa to accept his position with West Central Cooperative. The cooperative is in Ralston, Iowa which is near Carroll, Iowa. Claimant moved into a house owned by the cooperative. April and the minor child remained in Kansas.

Claimant sustained a horrific work injury on October 2, 2011. He was struck by a railroad train. At the time claimant was driving a wheel loader. The accident threw claimant nearly 50 feet from the equipment he had been operating. Claimant testified he does not recall the event.

After the accident, claimant was rushed to St. Anthony Regional Hospital in Carroll, Iowa. The initial assessment for claimant showed:

1. Motor vehicle accident with comminuted right hip fracture.
2. L3 and L4 fractures of the transverse processes.
3. Wedge fracture of T8 and T9 vertebral bodies.
4. Fracture of T8 spinous process.
5. Left ninth rib posterior fracture.
6. Distal right clavicle fracture.
7. Biparietal scalp laceration.
8. Head trauma with loss of consciousness and amnesia.
9. Insulin dependent diabetes mellitus.

(Ex. 8, pp. 1-2)

Thomas D. Dulaney, M.D., recommended a fixation of the right femoral head fracture. (Ex. 8, p. 5) Claimant underwent a right hip hemiarthroplasty. (Ex. 8, p. 5) He tolerated the procedure well. (Ex. 8, p. 6)

Amazingly, claimant returned to light-duty work on November 20, 2011. (Ex. M, p. 138) Claimant only performed managerial and paper-type duties. He did not engage in any of the physical tasks required of him. (Ex. A, p. 27) Effective November 28, 2011, claimant was allowed to work light duty for 8 hours per day. (Ex. D, p. 19)

On December 12, 2011, claimant reported his progress to Dr. Dulaney. Claimant indicated how well he had been doing but that he had experienced some back pain. (Ex. D, p. 20) Claimant reported he would like to have treatment for his left knee. (Ex. D, p. 20) MRI testing of the left knee showed a re-tear of the ACL graft. (Ex. 9, p. 1) Dr. Dulaney imposed certain work restrictions for the left knee. (Ex. D, pp. 21-22) Claimant was able to continue to work with the restrictions imposed.

On January 19, 2012, Dr. Dulaney performed a revision of a left anterior cruciate ligament rupture status post repair. (Ex. 8, p. 7) The surgeon allowed claimant to return to sedentary work on January 30, 2012. (Ex. D, p. 25) Claimant performed desk-

type duties. Claimant's left knee continued to improve. (Ex. 9, p. 2) In April of 2012, claimant's left knee improved but his right hip started to become more symptomatic. (Ex. 9, p. 3) Dr. Dulaney recommended a hip replacement. (Ex. 9, p. 3)

Devon D. Goetz, M.D., examined claimant because of the right hip problems he had been experiencing. (Ex. 9, p. 4) On August 10, 2012, Dr. Goetz performed a right total hip replacement. (Ex. 10, p. 1) Dr. Goetz anticipated maximum medical improvement after approximately six months. (Ex. D, p. 30) Claimant could return to work with restrictions on September 10, 2012. He could return to work without restrictions on November 10, 2012. (Ex. D, p. 30)

David E. Hatfield, M.D., examined claimant for back pain ensuing from the work injury. (Ex. 9, p. 7) The examination occurred on September 17, 2012. Dr. Hatfield ordered MRI testing of the spine. After reviewing the results, Dr. Hatfield opined there was not anything he could do surgically to benefit claimant's spine. The orthopedic specialist did not impose any restrictions for claimant's back. Dr. Hatfield placed claimant at maximum medical improvement effective October 31, 2012.

On November 16, 2012, claimant visited his personal physician, Richard B. Peters, M.D. Claimant wanted a consultation about his diabetes. Dr. Peters noted:

Brett Sullivan was in today in followup of his diabetes. He is generally feeling well. This is the best I have seen Brett doing since his accident a year or so ago. He is smiling, generally doing well. He has recently completed his operation in August which was a redo of his right hip. He is moving around much more comfortably. Recent blood sugars have been coming down now after being higher in the immediate postoperative timeframe in August and September.

(Ex. E, p. 37)

Claimant returned to Dr. Goetz on November 29, 2012. Claimant reported to the surgeon: "He states that overall, his pain is much improved from preoperatively. He states that he is "better ever since the day after surgery." (Ex. 9, p. 11) Dr. Goetz opined claimant was making good early progress. (Ex. 9, p. 12) Dr. Goetz counseled claimant on tobacco cessation.

On December 12, 2012, claimant reported to Dr. Dulaney that he had been doing well with the exception of some left knee issues. (Ex. D, p. 32) Dr. Dulaney assessed claimant's condition as "Status post ACL reconstruction with anterior knee pain and fibular head instability." (Ex. D, p. 32) Only conservative modalities were advised. (Ex. D, p. 32)

Effective February 13, 2013, Dr. Dulaney determined claimant had reached maximum medical improvement. (Ex. D, p. 34) The orthopedic surgeon opined

claimant had a permanent impairment rating. The rating was calculated in the following manner:

...From an impairment standpoint, he would have an impairment due to moderate cruciate laxity which in accordance with Table 17-33 on p. 546 of the AMA Guide to the Evaluation of Permanent Impairment, Fifth Edition, would result in a 17% lower extremity impairment of 7% whole person impairment.

(Ex. 9, p. 14) Dr. Dulaney indicated claimant could work as tolerated. (Ex. D, p. 34)

On May 28, 2013, claimant presented to Dr. Goetz for a right hip examination. Claimant reported his right hip was doing well, although he had some right groin and thigh pain. (Ex. 9, p. 16) Dr. Goetz found a tiny leg length discrepancy. The physician recommended a heel pad for the left shoe. Dr. Goetz opined claimant was at maximum medical improvement with respect to the right hip. (Ex. 9, p. 16) Claimant was allowed to continue to work without restrictions for the right hip. (Ex. D, p. 35)

On September 13, 2013, defendants sent claimant to Charles Mooney, M.D., MPH, for an independent medical examination. Dr. Mooney provided the following impairment ratings:

IMPAIRMENT RATINGS:

It is my opinion based on the 5th edition AMA Guide that Mr. Sullivan demonstrates the following impairments as it relates to the injuries discussed above:

THORACIC AND LUMBAR SPINE:

It is my opinion based on table 15-3, that Mr. Sullivan has an 8% impairment of the whole person applicable to DRE lumbar category 2, due to L3-L4 fractures of the transverse processes.

Further, it is my opinion based on table 15-4, that he demonstrates an 8% impairment rating of the whole person based on DRE thoracic category 2, due to wedge fracture T9 vertebral body and fracture of the T8 spinous process

RIGHT HIP

Impairment related to the right hip include rating as a FAIR result of the hip arthroplasty (page 546 Table 17-33) and results in a 20 percent whole person impairment.

Although there is significant variation in his complaints, and the opinion of his treating provider is that he would be placed in the GOOD

category, in my evaluation, Mr. Sullivan complains of near constant pain in the hip, which he describes at a level of 4 to 5. This would place him in the moderate category page 548 Table 17-34) [sic] and in reviewing his orthopedic surgeon's note, it is evident that he felt his pain rating would be significantly less. This is approximately a 20 point difference in my % assessment than I would consider his surgeon's to be. My total score is 66. His orthopedic surgeon's total score would more than likely be around 86, this is a significant difference and does move him from the "good hip replacement result" category to the "fair" category and I would subsequently provide a 20% whole person impairment or a 50% lower extremity impairment.

LEFT KNEE:

Additional impairments are indicated as it relates to his left knee injury and I agree with the orthopedic surgeon that he does demonstrate moderate laxity of the cruciate ligament resulting in a 7% whole person impairment or 17% lower extremity impairment best found on table 17-33 of the 5th edition guide.

Using the combined values table this then equates to a total 37% whole person impairment.

No additional requests have been forwarded and subsequently it is my opinion that the appropriate comprehensive impairment rating is 37% whole person impairment.

(Ex. 5, pp. 5-7)

On October 10, 2013, claimant and members of management entered into an agreement and release which ended the employment relationship between West Central Cooperative and claimant. As part of the agreement, claimant was paid 52 weeks of compensation through August 8, 2014. (Ex. M) The separation agreement had nothing to do with claimant's work injury. (Ex. M)

Also as part of the agreement, West Central Cooperative agreed it would not contest an application by claimant for unemployment benefits in Iowa. As a result, claimant received approximately \$323.00 every two weeks in unemployment insurance benefits from November 2013 through September 2014. When appropriate, claimant also received his workers' compensation benefits at the rate of \$854.19 per week. Claimant actually earned more money during this timeframe by not working than by working. There was no motivation for him to seek employment while he was receiving these benefits.

Subsequent to his termination, claimant decided to return to his home state of Missouri. That is when he moved to Grand Pass. He moved near other members of his family.

On February 27, 2014, claimant returned to Dr. Goetz for an examination of the right hip. Dr. Goetz found claimant to be doing well after the right total hip replacement, but claimant was complaining of severe low back pain. The right side was worse than the left. (Ex. 9, p. 18) Dr. Goetz ordered new MRI testing. (Ex. 9, p. 18)

The results of the MRI showed:

IMPRESSION:

1. Minimal to mild lumbar spondylosis with facet arthrosis and mild disc bulging as discussed. No significant central or foraminal stenosis.

(Ex. B, p. 6)

Dr. Goetz reviewed the MRI test results. He noted on April 17, 2014:

Per Dr. Goetz, patient has been advised that he has reviewed the MRI of his lumbar spine. Dr. Goetz states the MRI looks okay and does not show any cause of low back pain or bilateral thigh pain. Dr. Goetz' recommendation would be for the patient to contact his primary care physician for a recommendation to a pain management specialist. The patient voiced his understanding.

(Ex. D, p. 36)

On May 12, 2014, defendants sent claimant to Eli Sagan Chesen, M.D., a Diplomate of the American Board of Psychiatry and Neurology. (Ex. F, p. 44) The purpose of the examination was to determine whether claimant needed pain management from a psychologist or other specialist. After the examination, Dr. Chesen concluded:

Conclusions:

A. The patient has certainly survived a life threatening accident of serious proportions. It is of significance, given the vicissitudes of this case, that he was impressively rehabilitated and even returned to work for a little less than 2 years.

B. It is difficult to reconcile that he would do so well notwithstanding the seriousness of his accident, only to go through an exacerbation of his symptoms now for no apparent reason.

C. He is beginning to claim PTSD-like symptoms during a course in time when the natural course of such a condition would lead to improvement over time with or without treatment. It would be very unlikely and atypical for this to occur in the course of PTSD, depression or an anxiety disorder over a period of a few years with such a delayed onset of symptoms.

D. Given the timing and progression of the patient's symptoms, I see an absence of any psychiatric illness here and I am puzzled as to why he continued to stay off work.

In answering your specific questions I will note the following:

1. Psychiatric diagnosis...None.
2. If he does carry a psychiatric diagnosis, is it caused by or has it been materially aggravated by the work injury?...NA
3. If I have determined a work-related psychiatric injury, what further treatment would be required?...I see no psychiatric disorder and therefore see no need for any treatment.
4. If the incident lead to a change in his mental condition I am to explain the basis of my opinion...NA

Note: I will note that the patient suffers nothing in the way of residual significance from a concussive injury.

Disability Rating:

My method of calculating a % of disability reflects:

The Guidelines for the Forensic Evaluation of Psychiatric Disability prepared by the American Academy of Psychiatry and the Law.

(Ex. F, p. 50) Dr. Chesen did not recommend any additional treatment.

Eden Wheeler, M.D., examined claimant for the purposes of rendering a second opinion regarding claimant's condition. The examination occurred on September 3, 2014. (Ex. 6, p. 1) At the time of the examination, claimant reported the following difficulties:

Mr. Sullivan today does present with multiple subjective pain complaints, including his left shoulder, with no formal evaluation or treatment history. His primary issues, however, involves his low back with aching, burning, stabbing, sharp, stiffness, shooting and spasms. He has also constant right medial thigh pain, with both areas of pain increasing

with coughing or sneezing in particular, but also with lifting, bending, climbing stairs, intercourse, as well as prolonged standing, walking or sitting. He shares as well intermittent bilateral diffuse lower extremity numbness and tingling, right greater than left, perhaps 75% of the time, present since his last hip surgery in August 2012...

Mr. Sullivan also reports constant left knee pain, with rather diffuse involvement over the distal anterior aspect. However, he does not discuss swelling or instability. He does not acknowledge regular lower extremity strengthening exercises.

He also disclosed use of heel lift in his left shoe after right limb lengthening following his hip surgeries.

(Ex. 6, p. 2)

Dr. Wheeler diagnosed claimant with the following conditions:

1. Right central low back pain, with differential diagnosis of right SI joint dysfunction and/or facet mediated pain.
2. Leg length discrepancy S/P right hip surgical interventions from prior fractures.
3. Subjective left knee pain S/P ACL repairs.
4. Left shoulder pain without evaluation or treatment.
5. Other medical conditions including insulin-dependent diabetes mellitus and tobaccoism.
6. History of multiple trauma and multiple fractures as noted above.

(Ex. 6, pp. 6, 7)

Dr. Wheeler recommended physical therapy, a TENS unit for any lumbar pain, drug therapy, and some injections for pain. (Ex. 6, p. 7) Claimant thought the TENS unit was an inconvenience. (Ex. 6, p. 8) Claimant rated his pain levels from 5 to 10 on an analog scale. Claimant was amenable to continuing physical therapy for his back. (Ex. 6, p. 9)

Claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. On October 27, 2014, claimant presented to John D. Kuhnlein, D.O., MPH. Claimant reported having experienced some nightmares.

Dr. Kuhnlein diagnosed claimant with the following conditions:

1. HEENT
 - a. Closed head trauma with loss of consciousness. (Dr. Kuhnlein opined claimant reached maximum medical improvement on November 2, 2011 per Exhibit 1, page 23).
 - b. Biparietal scalp laceration with foreign bodies - resolved. Mr. Sullivan believes that he may still have foreign bodies in his scalp, but that has not been shown in the record.
 - c. His psychological symptoms suggest the possibility of posttraumatic stress disorder.
2. Chest.
 - a. Distal right clavicle fracture – resolved. Mr. Sullivan still has range of motion decrements in the right shoulder.
 - b. Left 9th posterior rib fracture – resolved.
3. Thoracic spine.
 - a. Mild wedge deformity at T8-T9.
 - b. Nondisplaced T8 spinous process fracture.
4. Lumbar spine.
 - a. Minimally displaced S5 fracture.
 - b. Nondisplaced left L3-L4 transverse process.
 - c. Right piriformis atrophy
5. Right lower extremity.
 - a. Comminuted right femoral head fracture and nondisplaced acetabular fracture with October 2, 2011, right hip hemiarthroplasty (Delaney) [sic] and subsequent August 10, 2012, hemiarthroplasty conversion to a right total hip arthroplasty (Goetz). Ongoing leg length discrepancy. Chronic right hip pain.
6. Left lower extremity.
 - a. Comminuted proximal left fibula – resolved.

- b. Left anterior cruciate ligament tear with January 19, 2012, ACL revision (Delaney) [sic].
 - c. Grade 2 medial collateral ligament tear.
 - d. There was an initial concern of a possible nondisplaced tibial plateau fracture from an initial x-ray, but this was not seen subsequent interval x-rays.
- 7. Left upper extremity.
 - a. Complaints of left shoulder pain.
 - b. Left lateral epicondylitis (see Goetz, May 28, 2013).
- 8. Metabolic.
 - a. Initial anemia – apparently resolved.
 - b. Reactive thrombocytosis – resolved.
- 9. While Mr. Sullivan's exam met more recent 2010 ACR Diagnostic Criteria for Fibromyalgia, it did not meet the 1990 ACR Diagnostic Criteria, and the areas where he complains of pain are areas where he has been injured. I do not think that he has fibromyalgia. I think he is expressing pain complaints in areas where he has been injured in this significant injury where he was hit by a train.

(Ex. 1, pp. 21, 22)

Dr. Kuhnlein rated claimant as having permanent partial impairment rating in the amount of 42 percent to the body as a whole. (Ex. 1, p. 24) Dr. Kuhnlein indicated he based his rating on the AMA Guides to the Evaluation to Permanent Impairment. (Ex. 1, p. 24) With respect to many of the ratings, Dr. Kuhnlein agreed with the ratings provided by Dr. Mooney.

Dr. Kuhnlein imposed a number of work restrictions. They were:

With respect to material handling, Mr. Sullivan could lift 30 pounds occasionally from floor to waist, as long as weights are kept close to the axial plane of his body. He could lift 40 pounds occasionally from waist to shoulder, as long as items are kept close to the axial plane of his body. If he is lifting more than elbow's distance away from his body, he should lift 30 pounds occasionally. Mr. Sullivan could lift 20 pounds occasionally over the shoulder.

With respect to nonmaterial handling, Mr. Sullivan would be able to sit, stand or walk on an as needed basis. He would probably need to change positions for comfort. He can squat, bend, crawl and kneel on an occasional basis. Given the issues, I would not have him work off ground level on ladders or at height. He can go up and down stairs. He can work occasionally at or above shoulder height. He can grip and grasp without restriction below shoulder height. He can grip and grasp occasionally above shoulder height because of the "moment arm" phenomenon in the lumbar spine, where he has had fractures, and the thoracic area where he has wedge deformities. He can travel for work, but will need to take breaks from time to time to stretch. He may need to stop every two or three hours. He cannot operate foot-operated machinery on a regular basis. He can do so on an occasional basis.

There are no vision, hearing or communication restrictions. He can use vibratory or power tools below shoulder height, but occasionally above shoulder height. There are no specific environmental restrictions. If working on uneven surfaces, he should be provided with good footwear. There are no personal protective equipment restrictions. Mr. Sullivan should avoid working on production lines because of the varied body part injuries associated with this injury. There are no shift-work issues, unless an independent psychiatrist says that he does have posttraumatic stress disorder. This should then be re-evaluated.

(Ex. 1, pp. 25, 26)

Pursuant to a request from claimant's attorney, claimant participated in a two-day neuropsychological assessment with Kenneth R. Mills, Ph.D., in Ames, Iowa. Batteries of tests were performed. Claimant had no prior history of counseling, drug therapy, psychological or psychiatric treatment. Claimant reported to Dr. Mills that nightmares occurred once a week, but he could not recall when they commenced. Claimant knew the nightmares did not begin immediately following the work injury. (Ex. 2, p. 6) Claimant had not reported any nightmares to his authorized treating physicians. Likewise, claimant had not reported any depressed feelings or feelings of anxiety to his medical providers.

Dr. Mills concluded after administering the tests:

Conclusion:

This gentleman's currently demonstrated level of attention, concentration, and memory appears to be incongruent with his reported history of pre-injury academic and vocational performance. It is likely that he demonstrates a mild/moderate decline in attention, concentration, and memory as a result of the mild traumatic brain injury he sustained in the 10/02/2011 worksite accident, in conjunction with the effects of chronic

pain. A diagnosis of Mild Neurocognitive Disorder, Due to Traumatic Brain Injury is indicated.

Anxiety:

Mr. Sullivan reported the experience of episodes of elevated anxiety, "constant worrying," and paranoid ideation, all of which began after the 10/02/2011 worksite accident. His completion of the Beck Anxiety Inventory (BAI) was descriptive of elevated anxiety.

This gentleman stated that he would "just as soon not talk about" the 10/02/2011 worksite accident. He indicated that he experiences ongoing nightmares about trains and people dying, and that his wife has told him that he screams in his sleep. He recalled that the nightmares did not begin immediately after the accident, but he was unable to estimate when they started. He notes that the frequency of the nightmares increased after he viewed a video of himself being hit by the train. He stated, "Train horns send cold chills down my back still to this day."

...

The most common concomitants of PTSD in males are depression and alcohol abuse. Mr. Sullivan reported multiple symptoms of moderate depression (see, below), and noted that he currently drinks approximately 6 beers each night, to help him fall asleep.

Based upon current test and interview data, as well as upon a review of the history, a diagnosis of Posttraumatic Stress Disorder, With Delayed Expression is indicated.

Depression

Mr. Sullivan's observed affect during the first day of testing was reserved, and appeared to decline during the second day. When asked to rate his mood over the past 30 days on a scale of 1 (depressed) to 10 (happy), Mr. Sullivan rated himself at "4 or 5."...

This gentleman's completion of the extensive Minnesota Multiphasic Personality Inventory-2 (MMPI-2) was valid, and was indicative of a diagnosis of Depression.

Mr. Sullivan's experience of symptoms of depression appears to be as a direct result of the sequelae of the 10/02/2011 worksite accident. The nature and extent of his symptoms, however, are beyond what would reasonably be considered to be a simple Adjustment Disorder. A diagnosis of Major Depressive Disorder, Single Episode, Moderate, With Anxious Distress is indicated.

(Ex. 2, pp. 30-32)

Dr. Mills opined claimant had reached maximum medical improvement with respect to mild neurocognitive disorder due to traumatic brain injury, would be at maximum medical improvement. (Ex. 2, pp. 32-33) Dr. Mills did not believe claimant was at maximum medical improvement with respect to PTSD, or major depressive disorder with anxious distress. (Ex. 2, p. 33) Dr. Mills opined if claimant did not receive treatment for his depression then he would be at MMI. (Ex. 2, p. 33)

Effective February 12, 2015, claimant reported to Dr. Wheeler, "The lower part of my back may be better." (Ex. 6, p. 10) Claimant also reported improvements in strength. (Ex. 6, p. 10) Physical therapy was discontinued, but claimant was encouraged to engage in home exercises. (Ex. 6, p. 10) SI joint injections were not considered. (Ex. 6, p. 12) Pain management was recommended for possible epidurals and medial branch blocks. (Ex. 6, p. 11)

Pursuant to a request from claimant's attorney, James L. Gallagher, M.D., a psychiatrist, examined claimant on March 26, 2015. A report was issued on April 15, 2015. (Ex. 3) Dr. Gallagher determined claimant had symptoms consistent with a major depressive episode, as well as anxiety, mostly consistent with posttraumatic stress disorder. Dr. Gallagher opined claimant had little positive feelings for the future, and he felt incapable of influencing his own environment. (Ex. 3, p. 14) Dr. Gallagher opined claimant's future employability was in jeopardy. (Ex. 3, p. 15) The psychiatrist opined claimant's employment was hampered by his chronic pain and his symptoms of anxiety, depression and PTSD. (Ex. 3, p. 16)

On April 2, 2015, Dr. Mooney issued another report. He confirmed his impairment rating of 37 percent to the body as a whole. (Ex. 5, pp. 8-9) Dr. Mooney opined claimant was able to perform work in **at least the medium category of work**. (Ex. 5, p. 9) (Emphasis added.)

Dr. Chesen reviewed the reports issued by Dr. Mills and Dr. Gallagher. In his report of April 26, 2015, Dr. Chesen explained why he differed with the opinions of the other two experts. (Ex. F, pp. 53-56)

Claimant presented to Daniel L. Bruning, M.D., because of low back pain that traveled down his groin and into his thighs with the right inner thigh pain greater than the left. (Ex. 7, p. 1) Claimant stated nothing relieved his pain. (Ex. 7, p. 1) Dr. Bruning injected claimant with an epidural steroid injection on April 23, 2015. (Ex. 7, p. 3)

On May 8, 2015, claimant returned to Dr. Bruning. (Ex. 7, p. 4) Claimant estimated his pain improved by 20 percent for at least a portion of time. (Ex. 7, p. 4) Claimant had problems with hyperglycemia following the epidural. Dr. Bruning opined claimant was too sensitive to the steroids. (Ex. 7, p. 4) On May 6, 2015, Dr. Bruning

performed a spinal injection under fluoroscopy. Claimant tolerated the procedure well. (Ex. 7, p. 6)

Subsequent to the date of the hearing, an independent medical examination was scheduled by defendants for claimant with Jim Andrikopoulos, Ph.D., a board-certified neuropsychologist in Des Moines, Iowa. Dr. Andrikopoulos had the following impressions:

IMPRESSION:

Cognitive Testing: This patient had cognitive deficits that included impaired memory, attention, grip strength, and fine motor speed. This is in excess of what would be found in any psychiatric condition or mild head injury. In addition the patient failed a test used to assess malingered memory. These cognitive results do not represent the patient's true cognitive abilities.

Psychological Testing: The personality testing suggests a somatoform disorder. In the context of litigation it can suggest the exaggeration of somatic symptoms. Additionally, two validity measures indicate (Fake-Bad Scale & F-r) the over-reporting of symptoms. In light of this the elevations of scales indicating emotional dysfunction are of questionable validity.

Patient interview: For the reasons that begin on page 10 (under numbers 7, 8, and 9) of this report, the interview suggests PTSD and mild head injury are not present in this patient.

The preponderance of the evidence suggests that the most parsimonious explanation for the impressions outlined above is malingering. The points below are numbered and lettered for the purposes of allowing the reader to easily identify the precise reasons that argue for the opinions expressed in this evaluation. These opinions are expressed within a reasonable degree of neuropsychological certainty.

(Ex. R, p. 176)

To support his opinions, Dr. Andrikopoulos wrote in relevant portion:

- i) In reviewing the medical records that were provided, there is no indication that the patient had complained of cognitive problems prior to his recent IME's. It seems if we accepted at face value the severity of these patient's cognitive difficulties, to report these symptoms after such a long period of time is a little peculiar. Most concussive symptoms are reported early following an injury when they are most troubling. In the majority of such cases, symptoms improve in a few weeks. In this case, the patient was assessed for cognitive difficulties

for the first time over three years after a mild head injury, long after the symptoms should have resolved rather than just begin to be the focus of assessment.

- j) In cases of possible malingering a select number of symptoms reported by the patient are chosen and the patient is asked when they first reported them, to whom, and if they have been provided with any explanation for why they have those symptoms (see Symptom Follow-up Interview section below) Unexplained symptoms, assuming a competent examiner, can mean a couple things: what the patient has is rare or is not real. The symptoms that are chosen for this inquiry are symptoms that are believed to not exist or are exaggerated.

The patient reported that the first time he reported his dreams, feeling anxious, memory problems and feeling depressed was in the context of the IME done at the request of his attorney. He denied reporting the tremor to anybody. He reports telling all doctors that the pain interfered with his sex life (has erectile dysfunction 75% of the time). While it is possible that it is in the medical record, I did not see that documented in the notes of his treaters as being the result of the accident. It was not documented in the IME's of Drs. Gallagher or Mills.

- k) If we assume this level of psychological distress, then not seeking psychiatric treatment when it was covered by workers' compensation requires an explanation. He has never complained of depression nor does it appear that any doctor suggested that he had it until he complained to the IME doctors.
- l) The patient reports being markedly symptomatic in regard to psychiatric symptoms but he takes no medication.

...

(Ex. R, pp. 186-187)

At the arbitration hearing, claimant testified he is able to ride a lawn mower, operate a weed eater, perform chores, drive to the grocery store, and perform maintenance on the vehicles and the fifth wheel camper, so long as he has some assistance from the children. Claimant is capable of refinishing antique furniture at his woodworking shop.

April Sullivan testified claimant does the dishes, vacuums the floor, folds the laundry and cuts the grass with the riding lawn mower. She testified claimant has nightmares and wakes up screaming, but he does not share his feelings about his work

injury with her. April testified she has been living with claimant **since** the work injury had occurred.

RATIONALE AND CONCLUSIONS OF LAW

The first issue for resolution is the proper weekly benefit rate to use to calculate claimant's weekly benefits. He maintains he was married and entitled to three exemptions. Defendants argue the claimant was single and entitled to two exemptions.

Iowa Code section 85.61(6) (a) and (b) discuss the number of exemptions for dependents is based upon claimant's tax returns "as though the employee had elected to claim the maximum number of exemptions for actual dependency... on the date on which the employee was injured."

On his 2011 tax returns, claimant claimed he was single with no dependents. He should not be considered married for the calculation of the weekly benefit rate. However, claimant maintained on the date of the work injury, he and April Sullivan had a common law marriage which is recognized in Iowa. Defendants dispute a common law marriage was in existence on the date of the work injury.

The Iowa Supreme Court in the case of In re Marriage of Winegard, 278 N.W.2d 505 (Iowa 1979), held there are three elements requisite for a common law marriage. The three elements are: 1) intent and agreement in present to be married by both parties; 2) continuous cohabitation; and 3) public declaration that the parties are husband and wife. Id. at 510. The burden of proof rests with the person asserting its existence. In re Marriage of Reed, 226 N.W.2d 795, 796 (Iowa 1975).

With respect to the first element there was no intent and agreement in the present to be married by both parties. The couple was formally divorced on June 10, 2011 in Missouri. Physical custody of the minor child was awarded to April. Claimant was ordered to pay child support to April for the child. When claimant commenced employment with West Central Cooperative, he elected one personal exemption. Claimant failed to introduce any documentary proof that he and April intended and agreed to be married at the time of the work injury.

The next element of continuous cohabitation was not met either. Claimant moved to Iowa to accept the job with West Central Cooperative. April testified she was living in Kansas with her son when her husband moved to Iowa. She also testified she did not begin to live with claimant until after the work injury had occurred. There was no continuous cohabitation.

Finally, the third element requiring public declaration did not occur. Two days after the work injury, claimant gave a statement to Ms. Serenity Daniels. In the recorded statement, claimant admitted he was a single person and paid child support for two children through the state of Missouri. (Ex. J, pp. 120-121) There were no other public declarations provided other than claimant's self-serving statements.

It is the determination of the undersigned; for the purposes of claimant's stipulated weekly gross earnings in the amount of \$1,442.31, claimant is entitled to the status of single with two exemptions. His appropriate weekly benefit rate is \$840.61 per week. Defendants have paid weekly benefits at a different rate. They are entitled to take a credit for all benefits paid prior to the filing of the decision.

The next issue to address is whether claimant has a mental component as a result of the serious physical injuries he sustained on October 2, 2011.

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).

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

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

Throughout the course of claimant's protracted medical treatment, he treated with a myriad of physicians for numerous problems related to his work injury. Some of the medical providers included Dr. Dulaney, Dr. Goetz, Dr. Hatfield, and Dr. Peters of the McFarland Clinic who was claimant's personal physician. Not one of the treating

doctors observed symptoms of depression, anxiety or aspects of posttraumatic stress disorder. Claimant did not complain of any mental health issues or request treatment for any mental conditions. Claimant sought no medication for any alleged depression, anxiety or PTSD.

Moreover, Dr. Peters noted more than one year after the work injury, how well claimant was doing. The physician noted in his records for November 19, 2012:

Brett Sullivan was in today in followup of his diabetes. He is generally feeling well. This is the best I have seen Brett doing since his accident a year or so ago. He is smiling, generally doing well. He has recently completed his operation in August which was a redo of his right hip.

(Ex. E, p. 37)

Dr. Mooney conducted his IME on September 13, 2013. Claimant did report occasional difficulties with sleeping due to pain. He did not mention nightmares or waking up screaming in terror. Claimant did report occasional irritability. (Ex. 5, p. 3) Claimant admitted there was "minimal impact on mood and relationships." (Ex. 5, p. 4)

On February 14, 2014, claimant's counsel requested a "pain psychologist" to assist claimant with "signs of depression associated with his chronic pain." Claimant requested Stanley Butts, Ph.D. The request was denied. Claimant was sent to Dr. Chesen for a psychiatric examination. The psychiatrist opined claimant had no psychiatric condition. (Ex. E, p. 50)

Defendants agreed to send claimant to a physician who specialized in pain management. Claimant reported issues with sleeping to the physician. Claimant demonstrated only mild pain behaviors. (Ex. 6, p. 2) On December 10, 2014, claimant reported "nightmares" to Dr. Wheeler, but he also admitted he was not taking his prescription for cyclobenzaprine as directed. (Ex. 6, p. 8) Dr. Wheeler did not report observing symptoms consistent with depression, anxiety or PTSD.

Dr. Bruning, noted no symptoms of depression, anxiety, or PTSD. Claimant reported a 20 percent decrease in his pain as a result of an injection. (Ex. 7, p. 4)

It is acknowledged; Dr. Kuhnlein wrote in his report of January 9, 2015, "It is uncertain whether he [claimant] has posttraumatic stress disorder; this should be assessed by a qualified objective psychiatrist at this point." (Ex. 1, p. 23) Dr. Kuhnlein is not trained in psychiatry or psychology.

There are two experts who favor claimant's position that he has a mental component stemming from his work injury. The experts are Dr. Mills and Dr. Gallagher. Their opinions were detailed in preceding paragraphs. There are two experts who expressly disagree with Dr. Mills and Dr. Gallagher. They are Dr. Chesen and Dr. Andrikopoulos. Their opinions were also detailed in preceding paragraphs. The two defense experts maintain claimant is malingering and he has no psychiatric diagnosis.

In this case, the old adage, "actions speak louder than words," applies. For more than two years after the work injury, claimant attended numerous medical appointments. He returned to work and performed his duties, even though he had faced several surgeries, physical therapy sessions, and had to use such assistive devices as wheelchairs and walkers to perform his duties. Throughout that time frame, claimant did not report to any of his medical providers or to his supervisors he was having depression, anxiety, or PTSD. Claimant did not request treatment or drug therapy for any mental health issues. His numerous treating physicians did not observe symptoms consistent with any mental conditions. Moreover, April Sullivan often attended the medical appointments with claimant. She never indicated to the medical providers there was any change in claimant's mood or in his relationships with the family. Claimant is not requesting medical care for any claimed mental condition.

It is only when claimant retained the services of his own experts in the fields of neuropsychology and psychiatry did claimant's mental health become an issue in the case. Even then, claimant did not seek treatment for any depression, anxiety or PTSD. It is the determination of the undersigned; claimant does not have a mental condition that is the result of his work injury on October 2, 2011.

Claimant does have an injury to the body as a whole as a result of all the physical injuries he sustained on October 2, 2011. 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.

Dr. Mooney rated claimant as having a 37 percent impairment to the body as a whole. The evaluating physician indicated claimant should be able to work in at least the medium category of labor. Dr. Kuhnlein rated claimant as having a 42 percent impairment to the body as a whole. Dr. Kuhnlein's restrictions were discussed earlier in the body of this decision. They seem reasonable given the extent of claimant's physical

injuries. The other treating physicians placed claimant at maximum medical improvement but did not impose formalized restrictions. No treating physician has restricted claimant from working. In fact, claimant returned to work six weeks after his work injury and remained working until he and West Central Cooperative entered into a separation agreement and release.

Claimant is a young man of 35. He has at least 30 years remaining to build a career. He did well in the community college setting. Retraining is a viable alternative for him. Claimant has held managerial positions. With additional education, he could return to other types of management. He is not without skills.

There were two vocational experts who supplied opinions in the case. Mr. Phil Davis, M.S., vocational specialist, determined claimant had lost 100 percent access to the labor market. (Ex. 4, p. 7) Ms. Connie S. Oppedal, M.S., vocational consultant, found at least ten jobs she thought were suitable for claimant. Not any of the jobs paid an amount equal to claimant's \$75,000.00 salary that he was paid at the time of his work injury. Claimant has lost actual wages. He has a loss of earning capacity.

Claimant has not been motivated to secure new employment. He was earning more money by not working than by working. There was no incentive for him to seek employment when he was receiving his unemployment insurance benefits, his severance package and his workers' compensation.

When all of the factors involving industrial disability are considered, it is the determination of the undersigned; claimant has a permanent partial disability in the amount of 60 percent. Claimant is entitled to three hundred (300) weeks of permanent partial disability benefits at the rate of \$840.61 per week and commencing from September 12, 2012. Defendants shall take credit for all benefits previously paid, including any overpayments made due to any rate issues.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989)

The next issue for resolution is whether costs should be assessed to defendants because they failed to admit to certain Requests for Admissions pursuant to Iowa Rule of Civil Procedure 1.510 and Rule 1.517(3). No costs will be assessed to defendants because they failed to admit to certain requests. Defendants had reasonable grounds to believe they would prevail on the matter.

The final issue is costs to litigate. The deputy workers' compensation commissioner has discretion to tax costs. Dickenson v. John Deere Products Engineering, 395 N.W. 2d 644, 647 (Iowa Ct. App. 1986). The subsequent

costs are assessed to defendants:

Filing fee \$100.00

Service of Petition \$12.96

Deposition of Claimant \$92.85

Report by Dr. Mills \$800.00

Report by Dr. Gallagher \$700.00

TOTAL \$1,705.81

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant three hundred (300) weeks of permanent partial disability benefits commencing from September 12, 2012 and payable at the rate of eight hundred forty and 61/100 dollars (\$840.61) per week.

Accrued benefits shall be paid in a lump sum, together with interest at the rate allowed by law.

Defendants shall take credit for all benefits previously paid, including any overpayments.

Costs as established in the body of the decision, are assessed to defendants.

Defendants shall file all reports as required by this division.

Signed and filed this 21st day of December, 2015.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

SULLIVAN V. WEST CENTRAL COOPERATIVE
Page 24

Copies To:

Thomas M. Wertz
Attorney at Law
PO Box 849
Cedar Rapids, IA 52406-0849
twertz@wertzlaw.com

Jeffrey W. Lanz
Attorney at Law
2700 Westown Pkwy, Ste. 170
West Des Moines, IA 50266
jlantz@desmoineslaw.com

MAM/sam

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.