

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MOHAMED GARCIA,

Claimant,

vs.

SMITHFIELD FOODS, INC.,

Employer,

and

SAFETY NATIONAL CASUALTY CORP., :

Insurance Carrier,
Defendants.

File No. 1657969.01

A P P E A L

D E C I S I O N

Head Notes: 1402.20; 1402.40; 1803;
2204; 2206; 2502; 2907

Defendants Smithfield Foods, Inc., employer, and its insurer, Safety National Casualty Corporation, appeal from an arbitration decision filed on February 16, 2022. Claimant Mohamed Garcia cross-appeals. The case was heard on February 12, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on March 8, 2021.

In the arbitration decision, the deputy commissioner found claimant met his burden of proof to establish he sustained a back injury and somatic symptom disorder as sequelae of the stipulated September 19, 2018, work injury to his right lower extremity. The deputy commissioner found that because at the time of the hearing claimant was earning the same or greater salary than he received at the time of the injury, claimant's recovery is limited to functional disability and not loss of earning capacity. The deputy commissioner found claimant sustained six percent impairment of the body as a whole for the right leg injury and three percent impairment of the body as a whole for the back injury, for a combined nine percent impairment of the body as a whole, which entitles claimant to receive 45 weeks of permanent partial disability benefits commencing on November 25, 2019. The deputy commissioner found that while claimant sustained permanent somatic symptom disorder as a sequela of his stipulated leg injury, claimant was not entitled to any permanent partial disability benefits because the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) (AMA Guides) do not allow for an impairment rating to be assigned for a mental health impairment. The deputy commissioner found that pursuant to Iowa Code section 85.39, claimant is entitled to reimbursement from defendants in the amount of \$1,437.50 for one-half of the cost of the independent medical examination (IME) of claimant conducted by Sunil Bansal, M.D. for claimant's right knee condition. The

deputy commissioner found that pursuant to rule 876 IAC 4.33 claimant is entitled to reimbursement from defendants in the amount of \$103.00 for the filing fee, \$13.50 for the service fee, and \$1,148.50 for one-half the cost of Dr. Bansal's report for claimant's back condition. The deputy commissioner preserved claimant's constitutional challenge to Iowa Code section 85.34(2)(x).

On appeal, defendants assert the deputy commissioner erred in finding claimant proved he sustained back and mental health injuries as sequelae of the stipulated right lower extremity injury, and defendants assert the deputy commissioner erred in finding those conditions are the cause of permanent disability. Defendants assert the deputy commissioner erred in finding the commencement date for permanent partial disability benefits is November 25, 2019. Defendants assert the deputy commissioner erred in finding claimant is entitled to reimbursement from defendants for the cost of Dr. Bansal's report relating to claimant's back injury. Defendants assert the remainder of the decision should be affirmed.

On cross-appeal, claimant asserts the deputy commissioner erred in finding claimant is not entitled to an award of permanent partial disability benefits for his mental health condition, and claimant asserts the deputy commissioner's failure to award claimant permanency benefits for his mental health condition violates claimant's constitutional rights. Claimant asserts the remainder of the decision should be affirmed.

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 February 16, 2022, is affirmed in part, modified in part, and reversed in part, with my additional and substituted analysis.

Without additional analysis, I affirm the deputy commissioner's finding that claimant proved he sustained a back injury as a sequela of the work injury. I affirm the deputy commissioner's finding that because at the time of the hearing claimant was earning the same or greater salary than he received at the time of the injury, claimant's recovery is limited to functional disability and not loss of earning capacity. I affirm the deputy commissioner's finding that claimant sustained six percent impairment of the body as a whole for the right leg injury and three percent impairment of the body as a whole for the back injury, for a combined nine percent impairment of the body as a whole, which entitles claimant to receive 45 weeks of permanent partial disability benefits commencing on November 25, 2019. I affirm the deputy commissioner's finding that pursuant to Iowa Code section 85.39, claimant is entitled to reimbursement from defendants in the amount of \$1,437.50 for one-half of the cost of Dr. Bansal's IME for claimant's right knee condition. I affirm the deputy commissioner's finding that pursuant to rule 876 IAC 4.33, claimant is entitled to reimbursement from defendants in the amount of \$103.00 for the filing fee, \$13.50 for the service fee, and \$1,148.50 for one-half the cost of Dr. Bansal's report for claimant's back condition. Claimant's constitutional challenge to Iowa Code section 85.34(2)(x) is preserved for appeal.

With my additional and substituted analysis, I reverse the deputy commissioner's finding that claimant sustained permanent somatic symptom disorder caused by the

work injury, I modify the finding that claimant sustained a permanent mental health condition as a sequela of the work injury, and I affirm the deputy commissioner's finding claimant is not entitled to an award of permanent partial disability benefits for his sequela mental health condition.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997) When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability

found to exist,” the claimant is entitled to compensation. Iowa Dep’t of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held:

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a “personal injury” under our Workmen’s Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

In 2016, claimant began treating with RoseMary Mason, M.D. and David Creti, M.D. with Crawford County Clinic for stress, sleeping problems, neck pain, and anxiety he attributed to working long hours in a hard job with defendant-employer. (JE 2, pp. 18-19) Claimant was diagnosed with anxiety, depression, stress, and insomnia and received a prescription for Ambien. (JE 2, pp. 18-19)

In March 2017, Dr. Mason completed Family Medical Leave Act (FMLA) paperwork for claimant’s stress and depression. (JE 2) During an appointment on March 28, 2017, Dr. Mason diagnosed claimant with insomnia, stress, and depression, noted claimant worked long hours in a hard job, prescribed citalopram, and excused claimant from work from March 28, 2017, through April 2, 2017. (JE 2, p. 20)

Defendant-employer approved claimant’s request for FMLA leave. (JE 2) Defendant-employer approved claimant’s FMLA recertification for depression in March 2018. (JE 2, p. 29) The recertification paperwork completed by Dr. Mason noted “[h]e may miss 4 or 5 days [per] month for up to 1 [year].” (JE 2, p. 32)

In August 2017, claimant began treating for depression, stress, and sleeping problems with Denison Family Health Center where he was treated by several nurse practitioners and Michael Luft, D.O., a family medicine physician. (JE 3) During an appointment on August 4, 2017, Sara McIntosh, ARNP, diagnosed claimant with severe depression, anxiety, excessive daytime sleepiness, snoring, headache, and frequent nocturnal awakening. (JE 3, p. 36) McIntosh prescribed escitalopram, referred claimant for a sleep study, and excused claimant from work from August 4, 2017, through August 5, 2017, due to his depression. (JE 3, p. 36-38)

Claimant continued to treat with Denison Family Health Center for depression, anxiety, stress, and sleeping problems up through the time of the September 19, 2018, work injury. (JE 3) He continued to use intermittent FMLA leave for depression. Following the work injury claimant continued to treat with Denison Family Health Center for anxiety, depression, and sleeping problems. (JE 3)

During an appointment with Dr. Luft on January 7, 2019, claimant reported he was experiencing increased stress, anxiety, and insomnia due to family problems at home. (JE 3, p. 63) Dr. Luft diagnosed claimant with anxiety and severe depression, continued claimant's prescription for escitalopram, and restricted claimant from working for two days. (JE 3, pp. 63-66) Claimant attended follow-up appointments with nurse practitioners at the Denison Family Health Center on March 22, 2019, July 11, 2019, complaining of increased anxiety due to his son's chronic health condition, and increased stress from working long hours. (JE 3, p. 67-74) Claimant continued to use intermittent FMLA leave. Denison Family Health Center completed his annual FMLA paperwork for depression in July 2019, which defendant-employer approved. (JE 3, pp. 75-80)

On September 16, 2019, claimant attended an appointment with Kelli Borkowski, ARNP, with Denison Family Health Center reporting his depression had worsened since his knee surgery in January 2019, due to his knee pain and long work hours, and his escitalopram was not helping. (JE 3, pp. 82-83) Borkowski discontinued claimant's escitalopram and prescribed sertraline. (JE 3, p. 84) Claimant continued to treat for his depression and anxiety with Denison Family Health Center for depression and anxiety. (JE 3, pp. 85-106) Dr. Luft doubled the dosage of claimant's sertraline during an appointment on February 3, 2020. (JE 3, pp. 107-09) Claimant continued to treat for his depression and anxiety through August 21, 2020. (JE 3)

At hearing claimant alleged he sustained a permanent mental health sequela as a result of his right leg injury. Causation opinions were provided by Robert Arias, Ph.D., a psychologist retained by defendants, by Catalina Ressler, Ph.D., a psychologist retained by claimant, and by Dr. Luft, claimant's family medicine physician.

On October 29, 2020, Dr. Arias conducted an independent neuropsychological evaluation of claimant for defendants and issued his report on November 2, 2020. (JE 9) Dr. Arias examined claimant and administered a number of psychological tests. Dr. Arias noted claimant had a clear history of preexisting severe depression and anxiety and had been excused from work numerous times due to depression and stress, but claimant reported to Dr. Arias he had "very little" preinjury emotional distress and no preexisting mental health treatment. (JE 9, p. 184) Dr. Arias found:

[claimant's] psychometric findings on the MMPI-2 revealed over-reporting of symptoms, particularly somatically. As a result of the direct contradictions in his self-report relative to information contained in records, in conjunction with the described psychometric findings, this individual has not, within a reasonable degree of neuropsychological certainty, experienced an exacerbation of his pre-existing emotional distress. Moreover, he clinically presented as euthymic in his mood and stable in his affect. It should also be noted that his cognitive performance validity findings also revealed two failures, suggesting a 95% chance of non-credible performance due to suboptimal effort or an intent to perform poorly, according to empirically derived algorithms. The remainder of his cognitive

functioning, however, was within expected limits of normal variability, typically around the Low Average range of ability.

(JE 9, p. 184)

Dr. Luft responded to a check-the-box letter from claimant's counsel on December 7, 2020. (JE 3, pp. 122-30) Dr. Luft agreed he regularly treats individuals with conditions and/or injuries to the lower extremities, back, and mental disorders. (JE 3, p. 129) Dr. Luft disagreed with Dr. Arias' characterization of claimant and agreed that in the years he treated claimant he found claimant to be credible and forthcoming with respect to his physical and mental health symptoms and regarding the care claimant received prior to commencing care with Dr. Luft's clinic. (JE 3, p. 129)

Dr. Luft agreed he had diagnosed claimant with "underlying reactive Major Depressive Disorder, which has been substantially aggravated by (at least in a substantial part)" the September 2018 injury to his right lower extremity and "his resultant chronic pain and physical limitations resulting therefrom, which likely represents a permanent mental sequela" given his right lower extremity condition is permanent. (JE 3, p. 130) Dr. Luft also agreed that claimant will likely require ongoing mental health care, including mental health medications, claimant will likely have problems maintaining attention/concentration at work, he will likely miss work due to his psychological symptoms in the future, and the number of days he will miss at work will likely increase from the number of days he missed work before the September 2018 work injury. (JE 3, p. 130)

After reviewing Dr. Luft's opinion, Dr. Arias issued a letter challenging Dr. Luft's opinion, stating Dr. Luft is not qualified to perform psychological/neuropsychological assessments, Dr. Luft did not conduct any psychological/neuropsychological assessment of claimant "to provide a competent, valid assessment" of claimant's symptomatology and performance," Dr. Luft did not obtain objective assessment of psychological constructs, and there is no indication Dr. Luft administered any empirical validity assessment to claimant. (Ex. C, pp. 18-19)

Dr. Ressler conducted an independent mental health evaluation for claimant on December 9, 2020, and issued her report on December 18, 2020. (Ex. 2) Dr. Ressler diagnosed claimant with somatic symptom disorder, with predominant pain, severe. (Ex. 2, p. 20) As with Dr. Arias, Dr. Ressler opined the work injury did not aggravate claimant's preexisting anxiety or depression, finding "his current symptoms represent the development or morphing of his previous symptoms or diagnosis into this new mental health condition," but opined the work injury caused his current mental health diagnosis. (Ex. 2, pp. 21-22) Dr. Ressler stated she did not believe claimant was malingering, noting he did not exaggerate his expression of pain during her interview. (Ex. 2, p. 21)

Dr. Ressler recommended claimant work part-time until his condition improves, noting that as long as claimant works full-time, she believes he will have difficulty with absenteeism. (Ex. 2, p. 22) Dr. Ressler stated that because of claimant's pain and

sleep difficulties, he will have ongoing problems with concentration and attention, and he is more irritable at home. (Ex. 2, p. 22) Dr. Ressler also recommended future mental health care.

With respect to the issues of permanency and extent of disability, Dr. Ressler opined:

If Mr. Garcia's physical health concerns are in fact permanent (as I understand them to be from the medical records), then his psychological condition will likely be permanent in nature. If this was to be the case, using the *Guides to the Evaluation of Permanent Impairment*, I would rate Mr. Garcia's to be in Class 3 – Moderate Impairment (Impairment levels are compatible with some, but not all, useful functioning). Mr. Garcia is demonstrating most impairment in his activities of daily living, social functioning, and concentration tasks. Comparably, using the VA Disability Ratings for Mental Health Disorders, I would offer a 50% rating since Mr. Garcia does need his medication regimen in order to function and manage pain; he is also experiencing frequent drops in mood; is often anxious or stressed; and has significant difficulty sleeping. Moreover, Mr. Garcia is having trouble occasionally fulfilling his job requirements because of depression or pain; and he is struggling to maintain social connections including those he has with close family members.

(Ex. 2, p. 22)

Defendants provided Dr. Arias with Dr. Ressler's opinion. (Ex. D) Dr. Arias issued a letter challenging Dr. Ressler's report stating Dr. Ressler conducted a telehealth interview of claimant after a day of work when he was experiencing intense pain and was tired, her evaluation did not meet professional standards, and she did not administer any psychometric measures to support her conclusions. (Ex. D, p. 22) Dr. Arias disagreed claimant sustained somatic symptom disorder, with predominant pain, severe, as a sequela of the September 2018 work injury, noting the literature does not support such a diagnosis emerges in response to an accident or injury, but by a "need" for symptoms. (Ex. D, p. 22) Dr. Arias noted claimant's MMPI-2 findings "did indicate symptom magnification, particularly with regard to his somatic symptoms. In individuals with problematic validity findings of this nature, there is a very high error rate in diagnosing genuine Somatic Symptom Disorders. Thus, this is a problematic diagnosis both from a validity standpoint, and from an attribution of causality standpoint." (Ex. D, p. 23).

On January 11, 2021, Dr. Ressler provided a response to Dr. Arias' opinion stating she uses her clinical judgment to determine whether to administer assessments and noted she uses assessments 90 percent of the time. (Ex. 2, p. 24) She did not provide a reason why she did not use any assessments when evaluating claimant.

The deputy commissioner found Dr. Ressler's opinion to be the most persuasive, finding claimant met his burden of proof to establish he developed permanent somatic

symptom disorder as a sequela of the September 2018 work injury. Defendants assert claimant failed to prove he sustained a mental health sequela.

Based on my de novo review of the record I do not find the opinions of Dr. Arias or Dr. Ressler persuasive. I find the opinion of Dr. Luft, the treating family medicine physician, to be the most persuasive.

Dr. Ressler conducted a telehealth interview and she did not personally examine claimant. She did not administer any neuropsychological tests or explain why she chose not to do so when Dr. Arias challenged her opinion. No other expert has diagnosed claimant with somatic dysfunction disorder. Dr. Ressler found claimant has limitations in his activities of daily living, social functioning, and concentration. She did not explain what limitations claimant has in activities of daily living or social functioning to support her bare conclusions. Dr. Ressler only provided limited analysis on claimant's concentration difficulties. She did not address claimant's preexisting problems with concentration noted extensively by practitioners at Denison Family Health Center.

I also do not find Dr. Arias' opinion persuasive. Dr. Arias documented claimant "clinically presented as euthymic in his mood and stable in his affect." (JE 9, p. 184) No other medical provider has made a similar observation.

Dr. Luft and his colleagues at Denison Family Health have treated claimant for depression, anxiety, and insomnia for many years. Dr. Luft, is a board certified family medicine physician, he diagnosed claimant with major depressive disorder and he opined the September 2018 work injury substantially aggravated claimant's mental health condition. Dr. Luft treats patients with mental health conditions and he prescribes psychotropic medications as permitted by his Iowa medical license. I do not find Dr. Arias' challenge to Dr. Luft's training to be valid. Certainly, any individual who is permitted to prescribe psychotropic medications must first diagnose a patient before prescribing a medication. I find claimant proved the September 2018 work injury aggravated his preexisting major depressive disorder and the condition is permanent.

The parties agree claimant's earnings increased following the stipulated September 19, 2018, work injury to his right leg. A mental health impairment is an impairment of the body as a whole. Woods v. Accident Fund Ins. Co. of Am., 2018 WL 636083, File No. 5057998 (Iowa Workers' Comp. Comm'n. Jan. 17, 2018). Before 2017, impairments of the body as a whole were compensated industrially.

In 2017, the legislature modified Iowa Code section 85.34(2)(v) requiring an employee who returns to work and receives the same or greater salary, wages, or earnings than the employee received at the time of the injury to be compensated based on the employee's functional loss only and not for loss of earning capacity or the employee's industrial loss. The legislature also modified the provisions governing functional loss determinations, as follows:

. . . when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code § 85.34(2)(x).

In April 2008, the Iowa Workers' Compensation Commissioner adopted the AMA Guides 5th Edition ("AMA Guides") for determining extent of loss or percentage of impairment for permanent partial disabilities not involving a determination of reduction in an employee's earning capacity. 876 IAC 2.4; Iowa Admin. Code Supp. r. 2.4 (April 28, 2008). It is presumed the legislature was aware of existing decisions and the agency's rules adopting the AMA Guides when it modified the statute to require compensation based on functional loss when an employee returns to work and receives the same or greater salary, wages, or earnings than the employee received at the time of the injury. Roberts Diary v. Billick, 861 N.W.2d 814, 821 (Iowa 2015); Simbro v. Delong's Sportswear, 332 N.S.2d 886, 889 (Iowa 1983); Beier Glass Co. v. Brundige, 329 N.W.2d 280, 285 (Iowa 1983); Lever Bros. v. Erbe, 249 Iowa 454, 87 N.W.2d 469, 474 (1958).

Chapter 14 of the AMA Guides addresses mental and behavioral disorders, and discusses the principles of assessment, diagnosis and impairment, and the method for evaluating psychiatric impairment. Chapter 14 directs the examiner not to assign numeric percentages to estimate mental impairment, as follows,

Unlike cases with some organ systems, there are no precise measures of impairment in mental disorders. The use of percentages implies a certainty that does not exist. Percentages are likely to be used inflexibly by adjudicators, who then are less likely to take into account the many factors that influence mental and behavioral impairment. In addition, the authors are unaware of data that show the reliability of the impairment percentages. After considering this difficult matter, the Committee on Disability and Rehabilitation of the American Psychiatric Association advised *Guides* contributors against the use of percentages in the chapter on mental and behavioral disorders of the fourth edition, and that remains the opinion of the authors of the present chapter.

No available empirical evidence supports any method for assigning a percentage of impairment of the whole person; however, the following approach may be useful in estimating the extent of mental impairments. Not everyone who has a mental or behavioral disorder is limited in the ability to perform activities of daily living; however, there are individuals with less than

chronic, but still unremitting, impairments who are severely limited in some areas of functioning.

Translating specific impairments directly and precisely into functional limitations is a complex and poorly understood process. Current research finds little relationship between such psychiatric signs and symptoms as those identified during a mental status examination and the ability to perform competitive work. However, four main categories exist that assess many areas of function: (1) the ability to perform activities of daily living; (2) social functioning; (3) concentration, persistence and pace; and (4) deterioration or decompensation in work or worklike settings. Independence, appropriateness, and effectiveness of activities should also be considered.

Id. at 361.

Instead of assigning a numeric permanent impairment rating, the AMA Guides direct the examiner to assess and record the extent of function in the areas of activities of daily living, social functioning, concentration, and adaptation. After assessing and recording the extent of function, the AMA Guides then direct the examiner to assign each area a class of impairment, from Class 1, no impairment, to Class 5, an extreme impairment precluding useful functioning. Id. at 363.

This method of analysis differs from the other chapters of the AMA Guides, where the examiner assigns an impairment rating for the specific body part or parts. See Chapter 3, The Cardiovascular System: Heart and Aorta; Chapter 4, The Cardiovascular System: Systemic and Pulmonary Arteries; Chapter 5, The Respiratory System; Chapter 6, The Digestive System; Chapter 7, The Urinary and Reproductive Systems; Chapter 8, The Skin; Chapter 9, The Hematopoietic System; Chapter 10, The Endocrine System; Chapter 11, Ear Nose, Throat, and Related Structures; Chapter 12, The Visual System; Chapter 13, The Central and Peripheral Nervous System; Chapter 15, The Spine; Chapter 16, The Upper Extremities; and Chapter 17, The Lower Extremities. Chapter 18, Pain, also directs the examiner to use a different method. Under the AMA Guides, the examiner may assign a numeric impairment rating for the parts of the body, with the exception of mental health injuries.

The issue of how to determine functional loss for a work-related mental health injury raises an issue of statutory interpretation. In Iowa, the primary purpose of the workers' compensation statutes is to benefit the injured worker. Denison Mun. Util. v. Iowa Workers' Comp. Comm'n, 857 N.W.2d 230, 234-235 (Iowa 2014). The courts liberally construe the workers' compensation statutes in favor of the injured worker. Id.

The goal of statutory interpretation is "to determine and effectuate the legislature's intent." Rameriz-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing United Fire & Cas. Co. v. St. Paul Fire Marine Ins. Co., 677 N.W.2d 755, 759 (Iowa 2004)). The court begins with the wording of the statute. Myria Holdings, Inc. v. Iowa Dep't of Rev., 892 N.W.2d 343, 349 (Iowa 2017). When determining

legislative intent, the court looks at the express language of the statute, and “not what the legislature might have said.” Id. (citing Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008)). If the express language is ambiguous the court looks to the legislative intent behind the statute. Sanford v. Fillenwarth, 863 N.W.2d 286, 289 (Iowa 2015) (citing Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216, 223 (Iowa 2014)). A statute is ambiguous when reasonable persons could disagree as to the statute’s meaning. Rameriz-Trujillo, 878 N.W.2d at 769 (citing Holstein Elect. v. Brefogle, 756 N.W.2d 812, 815 (Iowa 2008)). An ambiguity may arise when the meaning of particular words is uncertain or when considering the statute’s provisions in context. Id.

When the legislature has not defined a term in a statute, the court considers the term in the context in which it appears and applies the ordinary and common meaning to the term. Id. (citing Rojas v. Pine Ridge Farms, L.L.C., 779 N.W.2d 223, 235 (Iowa 2010)). Courts determine the ordinary meaning of a term by examining precedent, similar statutes, the dictionary, and common usage. Sanford, 863 N.W.2d at 289.

Iowa Code section 85.34(2)(x) requires the extent of loss of permanent impairment for a “functional disability” to be determined “solely” by using the version of the AMA Guides adopted by the commissioner. The statute also prohibits the use of lay testimony or agency expertise in determining “functional disability.” The statute does not contain any express language providing the determination of extent of loss for a functional disability must be made by a physician or other medical provider.

As discussed above, the AMA Guides allow an examiner to provide an impairment rating for all body parts other than for mental and behavioral disorders. There is no express wording in the statute that the legislature intended to treat mental and behavioral disorders differently from other parts of the body. Reading the statute to allow for the recovery of functional loss for an injury to a toe and not for a mental or behavioral disorder because the AMA Guides proscribe the assigning of a numeric impairment leads to an absurd, illogical, and unjust result.

In S.L.H. v. State Comp. Mut. Ins. Fund, 303 Mont. 364, 15 P.3d 948 (2000), the Montana Supreme Court addressed a similar, but not a mirror image statute. S.L.H., a female bartender, was kidnapped from her bartending job, beaten and raped. She later developed PTSD and major depressive disorder and sought workers’ compensation benefits.

The Montana statute that set forth a procedure for determining an impairment rating for use in calculating an injured worker’s disability award, provided:

(1) An impairment rating:

(a) is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing;

(b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American medical association; and

(c) must be expressed as a percentage of the whole person.

Id. at 370, 15 P.3d at 953.

The trial court in S.L.H. required the expert evaluators to provide an impairment rating for the mental injury, finding the statute required the evaluator to express the evaluation of impairment as a percentage. One of the experts refused because the AMA Guides proscribed the use of percentages to express mental impairments. The other expert provided the requested rating, which the court adopted. The Montana Supreme Court found the court erred when it required the experts to translate their evaluations into percentages, noting the 3rd and 4th Editions of the AMA Guides advised practitioners against the use of percentages for mental impairments.

In reaching its conclusion, the Montana Supreme Court found the statute did not contain express language stating who must translate the impairment evaluation into a percentage, and the Montana Supreme Court found that the trial court's interpretation asked the experts to do the impossible by expressing the mental impairments as a percentage, while the AMA Guides proscribed the use of percentages to express mental impairments. The Montana Supreme Court noted:

When more than one interpretation is possible, in order to promote justice, we will reject an interpretation that leads to an unreasonable result in favor of another that will produce a reasonable result. An alternative reading of the statute that leads to a more reasonable result and also abides by its grammatical structure is that the percentage required by subsection (c) is independent of subsection (a) and can be expressed by the workers' compensation judge, rather than only by the impairment evaluator. The statute allows the judge to translate into a percentage the evaluator's medical determination of impairment.

Under this alternative interpretation, the judge himself, in S.L.H.'s case, could have translated Dr. Evans' evaluation of a mild-to-moderate mental impairment into a percentage in order to comply with the statute. This would have avoided the absurd result caused by interpreting the statute as the court did and would have furthered the legislative intent of compensating workers for physical injuries suffered on the job.

Id. at 372, 954.

The statute in this case requires the use of the AMA Guides in determining functional loss. The statute does not allow for the consideration of disability criteria adopted by the Veterans Administration used by Dr. Ressler. The AMA Guides direct the examiner to not assign a permanent impairment rating, but rather to assess and record the extent of the individual's functioning.

The AMA Guides direct the examiner to assess and record the extent of function for activities of daily living, social functioning, concentration, and adaptation. After assessing and recording the extent of function, the AMA Guides direct the examiner to assign a class of impairment, from Class 1, no impairment, to Class 5, an extreme impairment precluding useful functioning. Id. at 363. The categories recommended as “anchors for the categories of the scale,” are:

1. None means no impairment is noted in the function.
2. Mild implies that any discerned impairment is compatible with most useful functioning.
3. Moderate means that the identified impairments are compatible with some, but not all, useful functioning.
4. Marked is a level of impairment that significantly impedes useful functioning. Taken alone, a marked impairment would not completely preclude functioning, but together with marked limitation in another class, it might limit useful functioning.
5. Extreme means that the impairment or limitation is not compatible with useful function. Extreme impairment in carrying out activities of daily living implies complete dependency on another person for care. In the sphere of social functioning, extreme impairment implies that the individual engages in no meaningful social contact, as with a person who is in a withdrawn, catatonic state. An extreme limitation in concentration, persistence, and pace means that the individual cannot attend to a conversation or any productive task; this might be seen in a person who is in an acute confusional state or a person with a complete loss of short-term memory.

A person who cannot tolerate any change at all in routines or in the environment, or one who cannot function and who decompensates when schedules change in an otherwise structured environment, has an extreme limitation of adaptive functioning and an extreme psychiatric impairment. Such an individual might, for example, experience a psychotic episode if a meal is not served on time or might have a panic attack if left without a companion in any situation.

Id.

When assessing the severity of impairment, the AMA Guides direct the examiner to examine: (1) the effects of treatment; (2) the effects of structured settings; (3) the variability of mental disorders; (4) an assessment of workplace function; and (5) the effects of common mental and behavioral conditions. Id. at 364-365. In assessing workplace function, the AMA Guides recommend the examiner use the multidimensional description of residual functional capacity used in the Social Security regulations, as follows:

1. *Understanding and memory* relate to the individual's ability to remember procedures related to work; to understand and remember short, simple instructions; and to understand and remember detailed instructions.
2. *Sustained concentration and persistence* relate to the individual's ability to carry out short, simple instructions; carry out detailed instructions; maintain attention and concentration for extended periods of time; perform activities within a given schedule; maintain regular attendance and be punctual within customary tolerances; sustain an ordinary routine without special supervision; work with or near others without being distracted; make simple work-related decisions; complete a normal workday and workweek without interruptions from psychologically based symptoms; and perform at a consistent pace without an unreasonable number of and unreasonably long rest periods.
3. *Social interaction* involves the individual's ability to interact appropriately with the general public; ask simple questions or request assistance; accept instructions and respond appropriately to criticism from supervisors; get along with coworkers and peers without distracting them or exhibiting behavioral extremes; maintain socially appropriate behavior; and adhere to basic standards of neatness and cleanliness.
4. *Adaptation* is the ability to respond appropriately to changes in the work setting; to be aware of normal hazards and take appropriate precautions; to use public transportation and travel to and within unfamiliar places; to set realistic goals; and to make plans independently of others.

Id. at 365.

The AMA Guides note:

[i]n the ordinary individual, extreme impairment in only one area or marked limitation in two or more spheres would be likely to preclude the performance of any complex task, such as one involving recreation or work, without special support or assistance, such as that provided in a sheltered environment.

An individual impaired to a moderate degree in all four categories of functioning would be limited in the ability to carry out many, but not all, complex tasks. Mild to moderate limitations reduce overall performance but do not preclude some performance. Table 14-2 links specific impairments to potential associated disabilities.

Translating these guidelines for rating individual impairment on ordinal scales into a method for assigning percentage of impairments, as if valid estimates could be made on precisely measured interval scales, cannot be done reliably. One cannot be certain that the difference in impairment between a rating of mild and moderate is of the same magnitude as the difference between moderate and marked. Furthermore, a moderate impairment does not imply a 50% limitation in useful functioning, and an estimate of moderate impairment in all four categories does not imply a 50% impairment of the whole person.

Id. at 364.

Dr. Luft did not assess and record his observations of claimant's functioning or assign a class of impairment for each category. I rejected Dr. Ressler's diagnosis, she also did not record her observations of claimant's functioning, instead providing bare conclusions without supporting analysis.

Chapter 14 of the AMA Guides states activities of daily living include self-care, personal hygiene, communication, ambulation, travel, sexual function and sleep. Id. at 361. These activities are evaluated by looking at the individual's independence, appropriateness, effectiveness and sustainability. The examiner must "define the extent to which the individual is capable of initiating and participating in these activities independent of supervision or direction." Claimant clearly had issues with sleep before and after the work injury, which has resulted in difficulties with his work attendance. No analysis was provided by any expert regarding any other difficulties he has with activities of daily living or how his sleep issues have changed since the work injury. Claimant has continued to work full-time for defendant-employer since the work injury.

The AMA Guides state social functioning refers to an individual's ability to interact appropriately and communicate effectively with other individuals, including "family members, friends, neighbors, grocery clerks, landlords, or bus drivers. Impaired social functioning may be demonstrated by a history of altercations, evictions, firings, fear of strangers, avoidance of interpersonal relationships, social isolation, or similar events or characteristics." Id. at 362. An individual's strength in social functioning may be documented by the individual's ability to initiate social contact and interact and participate in group activities. Id. The examiner also considers cooperative behavior, awareness of others' sensitivities, consideration for others, and social maturity. Id. In the work setting, social functioning may involve responding to supervisors, being part of a team, and interaction with the public. Id. As noted above, claimant continues to work full-time for defendant-employer. While Dr. Ressler noted claimant has difficulties with irritability affecting his interactions with his family members, no expert has documented he has any deficits participating in group activities, lacks awareness of others, or lacks social maturity.

The AMA Guides recognize concentration, persistence and pace are needed to perform many activities of daily living, including task completion. Id. The term “task completion” refers to an individual’s ability to sustain focused attention long enough to timely complete tasks commonly found in activities of daily living or in a work setting. Id. Deficiencies are best found from observations in work like settings. Id. The examiner may evaluate concentration and mental status by having the individual perform such tasks as subtracting numbers serially from 100, by using psychological tests of intelligence or memory, with strengths and weaknesses described in terms of frequency of errors, time it takes to complete the task, and the extent the individual requires assistance to complete the task. Id.

Dr. Ressler found claimant had a deficit in concentration based on difficulty. Dr. Ressler observed subtracting sevens and spelling simple words backwards. (Ex. 2, p. 20) As noted by Dr. Arias, she interviewed claimant after a full work day when he was tired. Practitioners with Denison Family Health Center repeatedly noted claimant had difficulty with concentration before and after the work injury. No expert has opined how claimant’s condition has changed since the work injury. No evidence has been presented regarding problems claimant experiences with concentration in the work setting. Claimant continues to work full-time for defendant-employer. There was no evidence presented he has been disciplined, his job is in jeopardy, or he has posed a danger to himself or others at work due to a lack of concentration.

Claimant has not presented competent evidence supporting he has even mild limitations in his functioning using the criteria in the AMA Guides. While claimant has established the September 2018 work injury permanently aggravated his preexisting major depressive disorder as a sequela, claimant has not met his burden to prove he has sustained any permanent partial impairment attributable to the work injury.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on February 16, 2022, is affirmed in part, modified in part, and reversed in part.

Defendants shall pay claimant 45 weeks of permanent partial disability benefits at the rate of seven hundred ninety and 15/100 dollars (\$790.15) per week, commencing on November 25, 2019.

Defendants shall receive credit for all benefits previously paid.

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

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant one thousand four hundred thirty-seven and 50/100 dollars (\$1,437.50) for one-half the cost of Dr. Bansal's IME for claimant's right knee condition.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant one hundred three and 00/100 dollars (\$103.00) for the cost of the filing fee, thirteen and 50/100 dollars (\$13.50) for the service fee, and one thousand one hundred forty-eight and 50/100 dollars (\$1,148.50) for one-half the cost of Dr. Bansal's report for claimant's back condition, and the parties shall split 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 28th day of October, 2022.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

James Byrne (via WCES)

Michael Miller (via WCES)

Andrew Workman (via WCES)