BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

| | | |
|---|---|---|
| MICHAEL MIER, | : | File Nos.: 21008361.01 (DOI: 4/13/21) |
| | : | 21013699.01 (DOI: 9/24/21) |
| Claimant, | : | |
| | : | |
| vs. | : | |
| | : | ARBITRATION DECISION |
| JOHN DEERE DAVENPORT WORKS, | : | |
| | : | |
| Employer, | : | Head Notes: 1108.50, 1402.20, 1402.40, |
| Self-Insured, | : | 1701, 1802, 1803, 2501, |
| Defendant. | : | 2502, 2907, 4000.2 |

## STATEMENT OF THE CASE

Michael Mier, claimant, filed two petitions in arbitration seeking workers' compensation benefits from John Deere Davenport Works, self-insured employer as defendant. Hearing was held via Zoom on September 20, 2022.

The parties filed a hearing report for each file at the commencement of the arbitration hearing. On the hearing reports, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision. The parties are now bound by their stipulations.

Claimant, Michael Mier was the only witness to testify live at trial. The evidentiary record also includes joint exhibits 1-10, claimant's exhibits 1-11 and defendant's exhibits A-M. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on November 14, 2022, at which time the case was fully submitted to the undersigned.

## ISSUES

**File No. 21008361.01 (DOI: April 13, 2021[1])**

The parties submitted the following issues for resolution:

1. The nature and extent of permanent disability claimant sustained as the result of the stipulated April 13, 2021, work injury.

[1] The petition was originally filed with an injury date of April 14, 2021. It was later determined and the parties stipulated that the appropriate date of injury was April 13, 2021. (Tr. p. 6)

2. The appropriate commencement date for any permanent partial disability benefits.
3. Whether claimant is entitled to healing period benefits from October 26, 2021 through May 5, 2022.
4. Whether defendant is entitled to credit under Iowa Code section 85.38(2). If so, the amount of the credit.
5. Whether penalty benefits for nonpayment of weekly benefits. If so, the appropriate amount of the penalty benefit.
6. Whether defendant is responsible for payment of past medical expenses.
7. Whether claimant is entitled to reimbursement for an independent medical examination pursuant to Iowa Code section 85.39.
8. Whether an assessment of costs against the defendant is appropriate.

**File No. 21013699.01 (DOI: September 24, 2021)**

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury which arose out of and in the course of his employment on September 24, 2021. If so, the amount of permanency benefits claimant is entitled to receive.
2. Whether the alleged injury is the cause of permanent disability.
3. The appropriate commencement date for any permanent partial disability benefits.
4. Whether the alleged injury is the cause of temporary disability. If so, whether claimant is entitled to benefits from October 26, 2021 through May 5, 2022.
5. Whether defendant is entitled to credit under Iowa Code section 85.38(2). If so, the amount of the credit.
6. Whether defendant is responsible for payment of past medical expenses.
7. Whether claimant is entitled to reimbursement for an independent medical examination pursuant to Iowa Code section 85.39.
8. Whether penalty benefits for nonpayment of weekly benefits. If so, the appropriate amount of the penalty benefit.
9. Whether an assessment of costs against the defendant is appropriate.

## FINDINGS OF FACT

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

Claimant, Michael Mier, was hired by defendant, John Deere Davenport Works ("Deere) on November 27, 2017. He underwent and passed a preemployment physical. (Tr. pp. 13-15)

On April 13, 2021, Mr. Mier slipped on coolant on the floor at work. He did not fall but his right leg slid out and he felt pain. He reported the incident to his supervisor who sent Mr. Mier to the nurse at the plant. The nurse provided Mr. Mier with ibuprofen

and ice for his knee. Mr. Mier felt like he had sprained his knee and he was having difficulty walking. Mr. Mier continued to treat at the John Deere Clinic. His knee kept getting worse and eventually they sent him for an MRI. (Tr. pp. 17-21; JE2, pp. 23-28)

Mr. Mier underwent the MRI on May 28, 2021. The impression on the MRI was complex tear within the posterior horn of the medial meniscus with tear signal extending to the body and tricompartmental chondromalacia with small area of full-thickness cartilage loss in the mid femoral trochlea. (JE4, pp. 47-48) He was referred to John Hoffman, M.D. (JE2, p. 22)

On June 22, 2021, Mr. Mier saw Dr. Hoffman. He reported that he slipped on coolant at work and twisted his knee approximately three months ago. He had pain to the inside aspect of his right knee and has noticed an increase in pain to the outside aspect of his right hip. Dr. Hoffman discussed medial meniscus tear and chondromalacia to the patellofemoral joint. Mr. Mier was scheduled for a right knee arthroscopy with medial meniscectomy. He was to continue to work with restrictions of no kneeling, squatting and no lifting greater than 30 pounds. (JE5, pp. 51-53)

Dr. Hoffman performed right knee arthroscopy with partial medial meniscectomy on July 7, 2021. (JE6, pp. 84-86) He was off of work for three weeks after the surgery. (Tr. p. 23)

On July 14, 2021, Mr. Mier went to the John Deere Clinic where he saw Rick Garrels, M.D. for follow-up of his right knee. The notes state he had typical postoperative soreness and swelling. He was released to return to work for four hours per day. (JE2, p. 18)

After surgery, Mr. Mier underwent physical therapy beginning on July 20, 2021. At the August 30, 2021, physical therapy appointment Mr. Mier reported minimal pain. He stated he felt he would be ready for full duty work after one more week of therapy. He was given a full duty work return for September 9, 2021. (JE5, p. 55-65) The September 9, 2021 physical therapy notes state that Mr. Mier reported a slight decrease in right knee pain. He was to receive physical therapy every day for one more week until he returned to work. (JE8, pp. 108-09)

Mr. Mier returned to full duty work on September 9, 2021. On September 17, 2021, he went to the John Deere Clinic and reported increased discomfort to his right knee with extended hours of the mandatory 12-hour shift. He iced his knee for 20 minutes. (JE2, p. 8)

On September 22, 2021, Dr. Hoffman advised Deere that because Mr. Mier had not yet reached maximum medical improvement (MMI), the doctor was unable to provide an impairment rating. (JE5, p. 67)

Mr. Mier returned to the clinic at Deere on September 23, 2021. He was given Tylenol and ice for his right knee. (JE2, p. 8)

On Friday, September 24, 2021, Mr. Mier was at work when his right foot went down between the slats he was standing on and he almost fell; he felt pain in his right knee. Mr. Mier tried to find his supervisor, Mr. Austin Eddie, to report the incident to him, but his supervisor was gone for the day. He then went to medical and medical was also gone for the day. Mr. Mier knew he already had an appointment scheduled with Dr. Hoffman on Monday. (Tr. pp. 26-30, 52)

On Monday, September 27, 2021, Mr. Mier saw Dr. Hoffman. The notes state that he stepped in a hole at work yesterday[2] and twisted his knee. The diagnoses was pain in right knee, complex tear of medial meniscus, current injury, right knee, subsequent encounter. Dr. Hoffman removed fluid from the right knee and gave him a cortisone injection. (JE5, pp. 68-69) Mr. Mier went to work after his appointment with Dr. Hoffman. He reported the incident to his supervisor when he returned to work but, according to Mr. Mier, his supervisor just blew it off. (Tr. pp. 29-30)

Mr. Mier returned to the Deere Clinic on September 30, 2021. He saw Mary Huesmann, NP and reported tenderness over proximal right knee area. He was returned to regular duty. He was instructed to return to the Deere Clinic after his next ortho appointment or sooner if needed. (JE2, p. 7) On that same date there is a Deere Clinic note that states Dr. Garrels assigned 2 percent right lower extremity impairment for a partial medical meniscectomy, as assessed using Table 17-33, page 546. (JE2, pp. 7-8)

On October 5, 2021, Mr. Mier saw Dr. Garrells at the Deere Clinic for follow-up of his right knee. Prior to his last visit with Dr. Hoffman, Mr. Mier was working on one of the tables and fell between the slats. Dr. Hoffman noted he saw him and did not document anything significant, but did give him a cortisone injection. Mr. Mier continued to report lateral knee pain. An MRI was ordered. The notes state Mr. Mier was back performing his regular work and voiced no limitations. (JE2, p. 31)

An incident report was completed by Mr. Eddie on the evening of October 6, 2021. Pursuant to the second shift nurse, Mr. Brian Dugan's requested, Mr. Eddie send Mr. Mier to the Deere Clinic to file an incident report. According to Mr. Austin, it was at this point that Mr. Mier advised him that he had re-injured his knee on September 24, 2021. Mr. Mier stopped by medical that night around 10:45 p.m., but no one was there. Mr. Austin noted he was on vacation that night. Mr. Austin completed the incident report on October 6, 2021 after speaking with Mr. Mier. (Cl. Ex. 3, pp. 13-15)

The MRI of the right knee was performed on October 12, 2021. The impression included consideration of a retear of the posterior horn. (JE4, pp. 49-50) Dr. Garrels phoned Mr. Mier on October 19, 2021 to discuss the results of the MRI. He did not see anything acute. Mr. Mier continued to report discomfort and swelling in the knee.

[2] Claimant testified that the incident did not occur "yesterday" which would have been on Sunday; rather, it was the last day he worked which was Friday. (Tr. p. 34)

Under the causation section of the note Dr. Garrels checked work related. Mr. Mier was to return to regular duty work. (JE2, pp. 30-32)

On October 26, 2021, Dr. Hoffman administered another cortisone injection to the right knee which was painful and swollen. Mr. Mier was restricted to no work for three weeks. He was to attend physical therapy three times per week for four weeks; however, this was not authorized by Deere. (JE5, pp. 70-71) Dr. Hoffman did not see Mr. Mier again but on October 29, 2021, he changed his restrictions from no work to light duty or desk work. (JE5, p. 73)

There is a November 2, 2021, clinic visit progress note from the Deere Clinic. The note is signed by Dr. Garrels and states,

> I played phone tag with Jennifer today, but I finally did speak with her a few minutes ago. From his surgery, it was expected Mr. Mier would have been released 90 days postop which would have been early October.
>
> Mr. Mier had a visit on 10/7 and reported he had another injury to the knee.
>
> Jennifer requested they see him back in 3 weeks for a final postop visit and I was agreeable to this.
>
> I notified them repeatedly, we were not authorizing them to treat the new injury.

(JE2, p. 35)

On November 8, 2021, Dr. Garrels authored a missive to the safety manager at Deere. Dr. Garrels concluded,

> Mr. Mier had chronic right medical knee pain postoperatively. There were no clinical findings to support an alleged second injury, including no ecchymosis or loss of motion. In addition, Mr. Mier cannot recall the alleged date of injury consistently. I am unable to causally relate the second alleged injury to his work at John Deere Davenport Works.

(Def. Ex. C)

On November 9, 2021, defendant denied any additional treatment for Mr. Mier's right knee. (Cl. Ex. 5, p. 18)

Mr. Mier returned to see Dr. Hoffman on November 16, 2021 with ongoing knee pain. Dr. Hoffman did not feel the injury Mr. Mier suffered post op arthroscopy had significantly altered the course of his knee. Mr. Mier did not feel he could return to full duty work due to his knee. Dr. Hoffman ordered an FCE for the right knee. He was restricted to sit down work duty with limited walking and standing pending the FCE. (JE5, pp. 75-78) The FCE was not approved through workers' compensation. There is a hand-written note indicating that Dr. Garrels could assess permanent restrictions without an FCE. (JE5, p. 79)

On December 9, 2021, Dr. Garrels assigned permanent restrictions as follows: No squatting or kneeling, no prolonged standing, walking over 30 minutes of every hour, and rare twisting with his knee. The form indicates the restrictions are occupational. (JE2, p. 36)

Mr. Mier attended physical therapy from November 30, 2021 through April 21, 2022. He did this on his own because Deere denied authorization for any further treatment. (JE8, p. 110-JE10, p. 128)

On April 5, 2022, Mr. Mier saw Dr. Hoffman for follow-up of his right knee and to discuss his FCE. Mr. Mier reported he did not receive any relief from the October 26, 2021 cortisone injection. He described his current pain as 7 out of 10 at rest and 10 out of 10 with activity. Dr. Hoffman reviewed a note from Deere occupational health dated December 9, 2021 which had recommendations for permanent restrictions. Dr. Hoffman placed him at maximum medical improvement (MMI) as of today. Dr. Hoffman noted permanent restrictions for Mr. Mier were not to perform any squatting or kneeling, no prolonged standing or walking over 30 minutes per hour, rare twisting with right knee. Dr. Hoffman released Mr. Mier from his care. (JE5, pp. 80-81)

On January 14, 2022, at the request of his attorney, Mr. Mier saw Sunil Bansal, M.D. for an independent medical examination. (Cl. Ex. 1) Dr. Bansal diagnosed Mr. Mier with right knee medical meniscus tear and aggravation of chondromalacia. Regarding causation Dr. Bansal stated,

> This mechanism on April 14, 2021 involving slipping and twisting with torsion to the right knee caused a medial meniscal tear, requiring surgical repair. He also aggravated his chondromalacia patellae from the slip and twist, further aggravating it from the torsion injury on September 24, 2021, leading to further inflammation.

(Cl. 1, p. 10)

Dr. Bansal placed Mr. Mier at maximum medical improvement on November 16, 2021. Pursuant to Table 17-10 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Bansal assigned 10 percent right lower extremity impairment. Dr. Bansal restricted Mr. Mier to no kneeling or squatting, avoid multiple stairs or climbing, and no prolonged standing or walking greater than one hour at a time.

There is no dispute that Mr. Mier sustained a work-related injury to his right knee on April 13, 2021. Defendants do deny that he sustained a work-related injury on September 24, 2021. The central dispute in these cases is causation. There are several experts that address the issue of causation.

On November 8, 2021, Dr. Garrels stated that there were no clinical findings to support an alleged second injury. He noted Mr. Mier could not recall the alleged date of

injury consistently. He opined he was unable to causally relate the second alleged injury to his work at Deere. (JE2, p. 33)

On November 16, 2021, Dr. Hoffman opined that the injury he sustained on September 24, 2021 did not significantly alter the course of his right knee. (JE5, p. 77)

On January 27, 2022, Dr. Hoffman signed a four-page letter authored by defendant's attorney. (Def. Ex. G, pp. 24-27) Dr. Hoffman's signature indicates that he agrees that the letter was an accurate summary of the conversation he had with defendant's attorney. Dr. Hoffman opined that Mr. Mier's current condition of his right knee, including his right knee symptoms and antalgic gait is causally related to his pre-existing, non-work related right knee arthritis and arthritic changes and not causally related to either Mr. Mier's now repaired right knee meniscus tear, his work at Deere, or any alleged work injury. (Def. Ex. G, p. 26) Unfortunately, in his letter Dr. Hoffman does not address the issue of whether either of the alleged dates of injury or the work at Deere aggravated Mr. Mier's knee arthritis or arthritic changes. Likewise, the letter also fails to offer an explanation why Mr. Mier's pre-existing right knee arthritis was not symptomatic before the alleged injuries. (Def. Ex. G, pp. 24-27) Because the letter fails to address the issue of an aggravation and also fails to provide an explanation for the lack of right knee symptoms prior to the alleged injuries, I do not find the opinions of Dr. Hoffman contained in this letter to carry great weight.

Regarding causation, I find Dr. Bansal's opinions carry the greatest weight. He is the only physician in this case that addresses the issue of aggravation. Additionally, his opinion is consistent with the November 16, 2021 clinical note from Dr. Hoffman wherein Dr. Hoffman states that the second injury did not significantly alter the course of the right knee. I find that Mr. Mier sustained a work-related injury to his right knee on April 13, 2021 which was aggravated by the work incident of September 24, 2021. Furthermore, by September 24, 2021, Mr. Mier had not yet reached MMI for the April 13, 2021 injury. Thus, I find that Mr. Mier did not sustain a second injury on September 24, 2021; rather, it was a continuation or aggravation of his April 13, 2021 injury.

Because Mr. Mier failed to demonstrate that he sustained a separate injury on September 24, 2021, I find that an assessment of costs against defendant for that date of injury is not appropriate. I further find the other issues regarding the alleged September 24, 2021 date of injury are rendered moot.

The parties stipulated that Mr. Mier sustained permanent disability as the result of the April 13, 2021 injury. We now turn to the issue of extent of permanent disability.

On September 30, 2021, Dr. Garrels opined that Mr. Mier sustained 2 percent impairment of the lower extremity as the result of the partial medial meniscectomy. He cited to the AMA Guides, Fifth Edition, Table 17-33. (Def. Ex. A, p. 3) Via the January 27, 2022 letter authored by defense counsel, Dr. Hoffman also assigned 2 percent impairment of the lower extremity based on the AMA Guides for the meniscus tear. Neither of these ratings take Mr. Mier's chondromalacia into account. In Dr. Bansal's

February 2022 report, pursuant to the AMA Guides, he assigns 10 percent lower extremity impairment for the combination of the meniscal tear and chondromalacia. I find Dr. Bansal's rating is the only rating that included chondromalacia and therefore carries the greatest weight. Thus, I find that as the result of the April 13, 2022, work injury Mr. Mier sustained 10 percent permanent disability of his right lower extremity. As such, he has demonstrated entitlement to 22 weeks of permanent partial disability benefits.

Based on the report of Dr. Bansal, I find that on November 16, 2021, it was medically indicated that MMI from the injury had been achieved and the extent of loss or percentage of permanent impairment could be determined by using the Guides. (Def. Ex. G)

Mr. Mier is seeking temporary total weekly benefits from October 26, 2021 through May 5, 2022. Because Mr. Mier sustained permanent disability as the result of the work injury, these benefits would be properly categorized as healing period benefits. The parties stipulated that Mr. Mier was off of work during this period of time. Based on the opinion of Dr. Bansal I find that his healing period ended on November 16, 2021. Thus, I find Mr. Mier is entitled to healing period benefits from October 26, 2021 through November 15, 2021.

Claimant contends defendant is subject to penalty for failure to pay temporary total disability and/or permanent partial disability benefits. Claimant contends defendant should have paid benefits considering Dr. Hoffman's no work for three weeks restrictions imposed on October 26, 2021. (Cl. Ex. 5, p. 22) On November 1, 2021, claimant wrote to defense counsel seeking payment of weekly benefits. (Cl. 5, p. 22) On November 3, 2021, defendant advised claimant that defendant was investigating the October 5, 2021 (later amended to September 24, 2021) date of injury. On November 9, 2021, defendant issued a formal denial letter setting forth the basis for its denial. (Cl. Ex. 5, pp. 18-19) Claimant changed his alleged date of injury. Furthermore, defendant received additional information from Dr. Garrels and Dr. Hoffman which made claimant's claim fairly debatable. I find defendant had a good faith basis to deny payment of the benefits. I further find defendant conveyed the basis of the denial to the claimant. I find penalty benefits are not appropriate in this instance.

Claimant is seeking payment of past medical expenses. (Cl. Ex. 11) A review of the medical expenses set forth in claimant's exhibit 11 demonstrate that the expenses were incurred in connection with his right knee injury. I find defendant is responsible for these medical expenses.

Claimant is seeking reimbursement for the entire amount of Dr. Bansal's IME. Defendant contends claimant is only entitled to reimbursement for one-half of the IME fee because they denied liability for the second date of injury. In his IME report Dr. Bansal diagnosed and evaluated two right knee conditions, a torn meniscus injury and aggravation of chondromalacia. I found both conditions were related to the April 13,

2021 work injury. Thus, I find that defendant is responsible for the entire amount of the IME expenses, including mileage.

## CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e).

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

Based on the above findings of fact, I conclude that Mr. Mier did not sustain a separate injury on September 24, 2021; rather, he sustained an aggravation of the April 13, 2021 injury. Because he failed to prove he sustained a separate injury on September 24, 2021, all other issues regarding the September 24, 2021 date of injury are rendered moot.

We now turn to the remaining issues for the April 13, 2021 work injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy

of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(u) or for loss of earning capacity under section 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

In 2017, the legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts ch. 23. Before the 2017 amendments, the agency could use all evidence in the administrative record, as well as agency expertise, when determining the permanent disability of an injured worker. See, e.g., Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 421 (Iowa 1994). Under agency rules before the 2017 amendments, the Guides were considered a "useful tool in evaluating disability." Seaman v. City of Des Moines, File Nos. 5053418, 5057973, 5057974 (App. Oct. 11, 2019) (quoting Bisenius v. Mercy Med. Ctr., File No. 5036055 (App. Apr. 1, 2013)); see also Westling, 810 N.W.2d at 252. However, in cases involving injuries on or after July 1, 2017, the Guides are now more than a tool; they are dispositive.

> [W]hen 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 permanent 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*).

The Iowa Workers' Compensation Act now limits the determination of what, if any, permanent disability an injured employee has sustained to only the employee's functional impairment. In making that determination, the agency is prohibited from using lay testimony or agency expertise by Iowa Code section 85.34(2)(*x*). Under the statute, that determination must be made "solely by utilizing" the Fifth Edition of the Guides.

Based on the above findings of fact, I conclude Dr. Bansal's opinion regarding permanent disability to claimant's right knee carried the greatest weight. Thus, I conclude claimant has demonstrated entitlement to 10 percent impairment of his right lower extremity.

Under Iowa Code section 85.34(2)(*p*), entitlement to benefits is based on multiplying the percentage impairment by two hundred twenty weeks. Ten multiplied by two hundred twenty equals twenty-two. Therefore, Mr. Mier is entitled to twenty-two weeks of compensation for the permanent partial disability to his right leg caused by the work injury.

Compensation for permanent disability shall begin when it is medically indicated that MMI from the injury has been achieved and the extent of loss or percentage of permanent impairment can be determined by using the Guides. Iowa Code section 85.34(2). Based on the opinion of Dr. Bansal, I conclude the appropriate date for commencement of permanent partial disability benefits is November 16, 2021.

Claimant is seeking healing period benefits from October 26, 2021 through May 5, 2022. Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Defendant disputes claimant's entitlement to these benefits but does stipulate that he was off of work during this period. Defendants deny claimant's entitlement to healing period benefits based on the causation opinions of Dr. Hoffman and Dr. Garrels. However, as noted above, both Dr. Hoffman and Dr. Garrels failed to address the issue of aggravation. Based on the above findings of fact, I do not find the causation opinions of Dr. Hoffman and Dr. Garrels to be persuasive. Rather, I found the opinions of Dr. Bansal to carry greater weight. Therefore, I conclude that his ongoing symptoms in his right lower extremity are related to his April 13, 2021 work injury. Regarding the appropriate maximum medical improvement date, I find the opinion of Dr. Hoffman carries the greatest weight. Thus, I conclude claimant is entitled to healing period benefits from October 26, 2021 through November 15, 2021. Claimant has demonstrated entitlement to three weeks of healing period benefits.

We now turn to the issue of credit. The parties stipulated that prior to hearing claimant was paid 4.4 weeks of permanent partial disability benefits at the stipulated

weekly worker's compensation rate. I find that defendant is entitled to a credit for these benefits paid.

Defendant asserts that they are entitled to a credit under Iowa Code section 85.38(2) for weekly indemnity (WI) benefits paid to claimant by the defendant from October 26, 2021 through May 5, 2022. The Code provides the employer "shall be credited" for payments made under group disability plans when benefits should have been paid for a work-related injury. See Iowa Code section 85.38(2) The Commissioner has stated,

> the credit is applicable when benefits were paid as STD or LTD but should have been paid as workers' compensation benefits. Because claimants in such circumstances are entitled to either STD/LTD or workers' compensation, but not both, defendants get a credit for benefits paid and are responsible only for the difference. As a result, claimants are made whole, and do not double recover, while defendants' obligations are met, and defendants do not double pay.

Himmelsbach v. Quaker Oats Company, File No.: 5066732, 2021 WL 5932927, at *4 (Dec. 8, 2021).

Additionally, this agency has held that WI benefits qualify for credit against workers' Compensation benefits under Iowa Code section 85.38(2). See Norberg v. John Deere Davenport Works, 2013 WL 650742. On the hearing report claimant disputes that defendant is entitled to a credit for these benefits. However, the basis for the dispute is not known to the undersigned because claimant did not address this issue in his post-hearing brief. Because this is not listed as a disputed issue in claimant's post-hearing brief, it is presumed this issue is no longer in dispute. Thus, I conclude that under Iowa Code section 85.38(2) defendants are entitled to a credit for the amount of WI benefits paid, if those benefits should not have been payable due to a right of recovery under Chapter 85, Code of Iowa.

Claimant contends defendant is subject to penalty for failure to pay temporary total disability and/or permanent partial disability benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996). Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which

would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Based on the above findings of fact, I conclude that claimant's claim was fairly debatable. I find defendant had a good faith basis to deny payment of the benefits. I further find that defendant conveyed that basis to claimant. I conclude penalty benefits are not appropriate in this instance.

Claimant is seeking payment of past medical expenses. (Cl. Ex. 11) The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendant disputes that these expenses are causally related to the work injury. However, based on the above findings of fact, I concluded that claimant's ongoing right knee problems are related to the April 13, 2021 work injury. A review of the medical bills demonstrates that the bills are for treatment of claimant's right knee as the result of the work injury. Thus, I conclude defendant is responsible for the expense set forth in claimant's exhibit 11. Claimant is also seeking reimbursement for medical mileage as set forth in his exhibit 9. I find that the mileage submitted was for treatment of his right knee injury or for attendance at the IME. Thus, defendant is responsible for the mileage contained in claimant's exhibit 9. See Iowa Code section 85.27, 85.39.

Claimant is seeking reimbursement for the IME conducted by Dr. Bansal. The fee for Dr. Bansal's IME totals $2,652.00. Prior to the hearing defendant voluntarily reimbursed claimant in the amount of $1,326.00, which is one half of the IME. Defendant contends it is appropriate to only pay for one half of the IME because Dr. Bansal evaluated both alleged dates of injury and defendant only accepted one date of injury as compensable. I found that Mr. Mier's knee conditions, the meniscus tear and the aggravation of his chondromalacia are related to the April 13, 2021 date of injury. Because both of the conditions evaluated by Dr. Bansal were ultimately found to be compensable I find defendant is responsible for the entire amount of the IME. Defendant shall reimburse claimant for the remaining one-thousand three hundred twenty-six and no/100 dollars ($1,326.00).

Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or at the discretion of the deputy hearing the case. I find that claimant was generally successful in his April 13, 2021, claim and therefore exercise my discretion to conclude that an assessment of costs against the defendant is appropriate. First, claimant seeks the filing fee in the amount of $200.60; which is the filing fee for both files numbers. I find the filing fee for the April 13, 2021 case is an appropriate cost under 876 IAC 4.33(7). Thus, claimant is assessed costs for the filing fee in the amount of $100.00. Claimant also seeks costs for certified mail which totals $7.58 for both files. I find that this is an appropriate cost for the April 13, 2021 claim under 876 IAC 4.33(3). Defendant is assessed service fees in the amount of $3.79. Thus, defendant is assessed costs totaling $103.79.

ORDER

THEREFORE, IT IS ORDERED:

**File No. 21008361.01 (DOI: April 13, 2021)**

All weekly benefits shall be paid at the stipulated rate of seven hundred eighty-eight and 76/100 dollars ($788.76).

Defendant shall pay twenty-two (22) weeks of permanent partial disability benefits commencing on November 16, 2021.

Defendant shall pay three (3) weeks of healing period benefits from October 26, 2021 to November 15, 2021.

Defendant shall be entitled to credit for all weekly benefits paid to date.

Pursuant to Iowa Code 85.38(2) defendant shall be entitled to a credit for all weekly indemnity (WI) benefits paid to date.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendant shall pay these medical providers, reimburse claimant, reimburse all third-party payers, or otherwise satisfy and hold claimant harmless for medical expenses as set forth in claimant's exhibit 11.

Defendant shall pay claimant for the medical mileage contained in claimant's exhibit 9.

Defendant shall reimburse claimant in the amount of one-thousand three hundred twenty-six and no/100 dollars ($1,326.00) for the remaining cost of the IME.

Defendant shall reimburse claimant costs as set forth above.

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

**File No. 21013699.01 (DOI: September 24, 2021)**

Claimant shall take nothing from these proceedings.

Each party shall bear their own costs.

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

Signed and filed this _7th_ day of February, 2023.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Erin Tucker (via WCES)

Benjamin Patterson (via WCES)

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.