IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DONALD TURNER, Petitioner/Cross-Respondent, vs. NCI BUILDING SYSTEMS, INC. and LIBERTY MUTUAL INSURANCE COMPANY, Respondents/Cross-Petitioners.	)	Case No. CVCV064652 **ORDER ON PETITION AND CROSS PETITION FOR JUDICIAL REVIEW**

In person oral argument on the Petition and Cross Petition in this judicial review proceeding was held April 7, 2023. Petitioner/Cross-Respondent Donald Turner (Petitioner) was represented by attorney Thomas Wertz. Respondents/Cross-Petitioners NCI Building Systems, Inc. and Liberty Mutual Insurance Company (Respondents) were represented by attorneys Stephen Spencer and Christopher Spencer. Oral argument was reported.

Upon reviewing the court file and the administrative record in light of the relevant law, and after considering the respective statements of counsel, the court enters the following Order affirming the final agency order in its entirety for the reasons stated below.

BACKGROUND FACTS AND PROCEEDINGS

Petitioner filed a Petition with the Iowa Workers' Compensation Commissioner (the Commissioner) on February 12, 2020, alleging a work injury on August 1, 2018, to the body as a whole. (02/12/20 Petition). The administrative case proceeded on to hearing on May 11, 2021, before a Deputy Workers' Compensation Commissioner (the Deputy). The Deputy filed an Arbitration Decision on February 24, 2022, finding that Petitioner had carried his burden of proof to establish permanent injuries to his bilateral lower extremities, left shoulder and thoracic spine.

(02/24/22 Arb. Dec.). The Arbitration Decision specifically rejected Petitioner's contention that he had a mental health condition related to the alleged work injury. (02/24/22 Arb. Dec.). The Arbitration Decision then went on to award Petitioner 40% industrial disability, with benefits commencing on July 8, 2019. (02/24/22 Arb. Dec.). The Arbitration Decision also declined to permit Petitioner to offer a report for an evaluation of him by Ph.D. Beth Dinoff that would occur after the arbitration hearing. (02/24/22 Arb. Dec.).

Petitioner filed a Motion for Rehearing on March 15, 2022. (03/15/22 Motion for Rehearing). On April 5, 2022, an order was entered on Application for Rehearing noting that the issues regarding Petitioner's work injury, mental health and pain issues were addressed in the Arbitration Decision. (04/05/22 Ruling on App. for Rehearing). The Deputy also noted that he had previously discussed restrictions, and while he did not adopt Dr. Taylor's restrictions, the Deputy believed some restrictions would be necessary. (04/05/22 Ruling on App. for Rehearing). The Deputy again declined to admit the report from Ph.D. Dinoff. (04/05/22 Ruling on App. for Rehearing).

Petitioner filed a Notice of Appeal on April 20, 2022. Respondents filed a Notice of Cross-Appeal on April 25, 2022. (04/20/22 Notice of Appeal; 04/25/22 Notice of Cross-Appeal). On September 30, 2022, Commissioner Joseph S. Cortese, II, filed an Appeal Decision. (09/30/22 App. Dec.) The Commissioner affirmed the Arbitration Decision awarding 40% industrial disability. The Appeal Decision reversed the Arbitration Decision determination that Petitioner's permanent restrictions are those from Dr. Taylor's report. (09/30/22 App. Dec.) The Appeal Decision also reversed the Arbitration Decision regarding admissibility of the Dinoff's report into evidence, and reversed the finding that Petitioner did not establish a mental health sequela as part of the alleged work injury. (09/30/22 App. Dec.)

Petitioner subsequently filed a Motion for Rehearing with the Commissioner on October 17, 2022. (10/17/22 Mot. for Rehearing). On October 19, 2022, Respondents filed a Resistance to the Motion for Rehearing and their own Motion for Rehearing. (10/19/22 Mot. for Rehearing/Resistance) Neither Motion for Rehearing was ruled upon by the Commissioner within twenty days of filing, so they were deemed denied by operation of the Commissioner's rules. Iowa Administrative Code r. 876-4.24.

Petitioner filed a Petition for Judicial Review on November 18, 2022. (11/18/22 Pet. for Jud. Rev.) On December 2, 2022, Respondents filed an Answer and a Cross-Petition for Judicial Review. (12/02/22 Answer and Cross-Pet. for Jud. Rev.)

FINDINGS OF FACT

Petitioner began working at Respondent NCI Building Systems in November 2017. (Tr. p. 28). He worked full-time as a maintenance technician. (Tr. p. 21). He suffered a stipulated injury on August 1, 2018, while working for Respondent NCI. (Hr'g. Rep). On the alleged injury date, Petitioner testified that he was greasing a hub of a crane and was up on a scissor lift. (Tr. pp. 28-30). While Petitioner was working on the scissor lift, the crane moved and knocked over the lift, and Petitioner fell. (Tr. pp. 28-30). It is undisputed that Petitioner suffered an injury. The issues presented on judicial review all focus on the consequences flowing from this injury.

Petitioner was transported to a local hospital for initial evaluation. X-rays revealed Petitioner suffered a compression fracture of the spine, multiple rib fractures, a mildly displaced right scapular fracture, a fractured right tibia, and multiple fractures in the right foot and ankle. (Jt. Ex. 1, p. 7). Petitioner was transported to the University of Iowa Hospitals and Clinics (UIHC) and came under the care of Dr. Karam. (Jt. Ex. 2, p. 29). Dr. Karam performed an external fixation of the right tibial

fracture and a limited open reduction internal fixation of the distal tibial fracture. (Jt. Ex. 2, p. 29). Petitioner was discharged from the hospital on August 22, 2018. (Jt. Ex. 2, p. 22).

At some point Petitioner was assessed by Ph.D. Benjamin Tallman for any factors that might impact the course of Petitioner's recovery. (Jt. Ex. 2, p. 36). At the time of assessment Petitioner reported to Ph.D. Tallman that his mood was good, and that he was seeing overall improvement in his sleep and energy levels. (Jt. Ex. 2, pp. 36-37). Petitioner felt he was coping well with his current situation and denied any depressed mood or anxious feelings. (Jt. Ex. 2, pp. 36-37). Ph.D. Tallman opined that Petitioner's mood was predominately stable with mild fluctuation. (Jt. Ex. 2, p. 37).

Petitioner did not report any mental health symptoms to any physicians from September 7, 2018, through November 2, 2020. He did not identify any mental health concerns during his deposition on September 30, 2020. (Ex. L).

Petitioner went to the Neurosurgery Center for a six-week follow-up appointment on September 17, 2018. (Jt. Ex. 2, p. 38). Petitioner denied any significant upper back pain or neurologic symptoms at this visit. (Jt. Ex. 2, p. 38). Diagnostic imaging of the thoracic spine revealed the thoracic spine was appropriately aligned. (Jt. Ex. 2, p. 38). Dr. Nagashama opined that Petitioner could begin to advance his activities as tolerated from a neurological standpoint. (Jt. Ex. 2, p. 39). Petitioner was released from care for his thoracic spine at this juncture. The agency record does not disclose any additional significant care to Petitioner for this condition.

Petitioner followed up for his multiple rib fractures with Dr. Allen on October 1, 2018. (Jt. Ex. 2, p. 40). Petitioner reported no problems with his rib fractures. (Jt. Ex. 2, p. 40). Upon examining Petitioner, Dr. Allen stated further follow-up appointments by Petitioner with Dr. Allen were unnecessary. Dr. Allen deferred the decision on Petitioner's return to work to Dr. Karam. (Jt.

Ex. 2, p. 41). Put another way, Petitioner was discharged from Dr. Allen's care.

Petitioner continued to report pain in his right lower extremity. (Jt. Ex. 2, pp. 42-43). Imaging of the tibia and fibula and the ankle revealed incomplete healing of the fracture from the Petitioner's fall. (Jt. Ex. 2, p. 43). Dr. Karam removed the external fixator device. (Jt. Ex. 2, p. 43). Petitioner was placed into a short leg cast. (Jt. Ex. 2, p. 43). Eight weeks later Petitioner was transitioned into a walking boot. (Jt. Ex. 2, p. 47).

Petitioner also complained about the area of his left shoulder. Dr. Karam ordered an MRI, and eventually referred Petitioner to Dr. Patterson. (Jt. Ex. 2, pp. 47 and 53). Dr. Patterson diagnosed Petitioner with adhesive capsulitis. (Jt. Ex. 2, p. 56). Dr. Patterson recommended an injection in Petitioner's shoulder. (Jt. Ex. 2, p. 56).

On July 2, 2019, Dr. Karam placed Petitioner at maximum medical improvement (MMI) and released him to full-duty work without restrictions for his lower extremities. (Jt. Ex. 2, p. 68). At that time, Dr. Karam assigned a 31% impairment rating to Petitioner's right lower extremity. (Jt. Ex. 2, p. 69). Dr. Karam assigned no impairment rating for Petitioner's left foot and left ankle. (Jt. Ex. 2, p. 69).

Dr. Karam later revisited these opinions because Petitioner continued complaining about his left heel and right ankle. Petitioner returned to Dr. Karam on November 5, 2019. (Jt. Ex. 2, p. 76). Imaging of the left heel revealed stable alignment of the calcaneus fracture which appeared to be healed. Imaging of the right ankle revealed stable alignment of the hardware. (Jt. Ex. 2, p. 78). Following the November 5, 2019 appointment, Dr. Karam increased Petitioner's impairment rating to 38% to the right lower extremity. (Jt. Ex. 2, p. 78). Dr. Karam assigned a 0% impairment rating for the left calcaneus fracture. (Jt. Ex. 2, p. 78).

Petitioner presented to Dr. Patterson for left shoulder evaluation on July 3, 2019. (Jt. Ex. 2, p. 70). He said he had occasional pain with overhead activities which was well controlled with Tylenol. (Jt. Ex. 2, p. 70). Petitioner denied any numbness and tingling in his left arm or left hand. (Jt. Ex. 2, p. 70). Upon examination, Dr. Patterson thought Petitioner had marked improvement of his range of motion, calling it excellent. (Jt. Ex. 2, pp. 70-72). On July 3, Dr. Patterson released Petitioner without restrictions and placed Petitioner at MMI for his left shoulder. (Jt. Ex. 2, p. 72). Dr. Patterson assigned Petitioner's left shoulder a 9% impairment rating of the upper extremity. (Jt. Ex. 2, p. 72). Dr. Patterson opined that Petitioner's problems were confined solely to the area of the left shoulder as that description is understood by a board-certified orthopedic surgeon. (Ex. B).

The record discloses that Petitioner was released to work without restriction by all of his treating doctors by July 2019. Petitioner returned to his normal job for his normal pay in July 2019, and did so without any medical restrictions. (Ex. L, p. 43). Petitioner's own testimony is that the biggest problem he continued to experience after he was released from care was symptoms in both feet. (Ex. L, p. 45).

Petitioner was eventually furloughed from his job due to COVID-19 effective April 20, 2020. (Ex. I, p. 36). Respondent NCI ultimately downsized Petitioner's position effective September 21, 2020. (Ex. J, p. 37). Petitioner has not worked since then. (Tr. p. 45). Petitioner has not looked for work, submitted applications or sought out any type of alternative employment. (Tr. pp. 45-46). Petitioner has applied for social security disability benefits. (Tr. p. 46).

Petitioner's annual follow-up examination with Dr. Karam occurred in November 2020. At this in person examination, Petitioner had ongoing complaints of pain in his feet, as well as symptoms in other parts of his body. This was the first time Petitioner raised any mental health

complaints. (Jt. Ex. 2, p. 74-75). Petitioner also complained about other areas of his body. The Commissioner ultimately found these "other areas of his body" complaints were unrelated to Petitioner's injury, requiring no further discussion here. In his note about this visit, Dr. Karam observed that Petitioner was down about being let go from his job. (Jt. Ex. 2, p. 74). Dr. Karam prescribed anti-inflammatories. He sent Petitioner to pain management and requested EMG studies. (Jt. Ex. 2, p. 75).

Petitioner went to see Dr. Wikle at the University of Iowa Pain Clinic (UIPC) on November 18, 2020. (Jt. Ex. 2, p. 80). Petitioner reported his "normal pain" involving his feet. (Jt. Ex. 2, p. 80; Ex. K, p. 44). Petitioner had a cervical spine MRI on December 7, 2020. It revealed multi-level degenerative disc disease. (Jt. Ex. 2, pp. 91-92 and 94). Dr. Wikle said the EMG of Petitioner's right upper extremity revealed possible diabetic peripheral neuropathy. (Jt. Ex. 2, p. 102).

Petitioner sought an evaluation with Dr. Taylor on December 3, 2020. (Ex. 1). Dr. Taylor assigned Petitioner the following permanent impairment ratings: (1) a 20% rating to the right lower extremity due to arthritis of the ankle, (2) a 20% rating to Petitioner's right lower extremity for the intra-articular fracture, (3) a 6% rating to Petitioner's lower extremity for dysesthesias, (4) a 5% impairment to the left lower extremity due to dysesthesias, (5) a 9% rating to the upper for range of motion loss of the left shoulder, and (6) a 5% impairment rating to the body for a compression fracture. (Ex. 1, pp. 14-15).

Dr. Taylor also rated Petitioner's right upper extremity for conditions that were eventually determined to be unrelated to Petitioner's claimed injury. Dr. Taylor also assigned restrictions, but his discussion of the restrictions includes the right upper extremity which was ultimately found to be unrelated to Petitioner's claimed work injury. (Ex. 1, p. 15-16).

Petitioner saw Dr. Chen on January 5, 2021. (Ex. C). Dr. Chen said he could not causally relate Petitioner's right hand, elbow, neck or low back complaints to his August 1, 2018, work injury. (Ex. C, p. 14). Dr. Chen assigned (1) a 29% impairment rating to Petitioner's right lower extremity for his right ankle, (2) a 40% right lower extremity impairment due to Petitioner's post-traumatic osteoarthritis, (3) a 5% right lower extremity impairment rating for Petitioner's medial plantar and nerve injuries, and (4) a 5% left lower extremity impairment Petitioner's medial plantar and nerve injuries. (Ex. C, pp. 22-23).

Dr. Chen disagreed with Dr. Patterson's rating for Petitioner's left shoulder, finding that Petitioner had normal range of motion upon examination. Dr. Chen assigned no impairment for the left shoulder. (Ex. C, p. 23). Dr. Chen issued an opinion stating Petitioner was able to work without restrictions from July 2019 through March 2020. This led Dr. Chen to opine that Petitioner's idiopathic or personal factors would be the major contributing factor to any limitations to working as a maintenance mechanic. (Ex. C, p. 15).

On January 19, 2021, Dr. Karam authored opinions to Respondents. (Ex. A). Dr. Karam confirmed the treatment he provided Petitioner, and how Petitioner's right foot was related to Petitioner's work injury. Dr. Karam declined to address causation for Petitioner's mental health concerns. (Ex. A, pp. 1-4).

Dr. Patterson responded to similar questions. (Ex. B). Dr. Patterson said Petitioner did not express any complaints to Dr. Patterson during the course of his care of Petitioner indicative of a brachial plexus injury. (Ex. B, p. 5). Like Dr. Karam, Dr. Patterson declined to address causation regarding Petitioner's alleged neck and brachial plexus problems. (Ex. B, p. 6).

Dr. Wikle also issued opinions in this matter. Dr. Wikle disagreed that Petitioner's right

hand and arm symptoms arose from an ulnar nerve issue. (Ex. K, p. 45).

Petitioner was previously treated for an anxiety disorder and impulse control disorder on July 27, 2016. (Jt. Ex. 1, p. 20). Prior to his alleged work injuries, Petitioner sought therapy while going through a divorce. (Jt. Ex. 2, p. 36). Petitioner testified that he immediately began experiencing depression and anxiety issues when he returned to work. (Tr. p. 53). At the agency hearing Petitioner testified that he became very depressed when he was let go from his position with Respondent NCI Building Systems during the downsizing that occurred during COVID-19. (Tr. p. 54). Petitioner said this was really when he started feeling "worthless." (Tr. p. 55). At the same time Petitioner had issues with his daughter, who has serious medical issues of her own. (Ex. M, Depo. p. 17). His daughter ultimately left Petitioner's home and went to live with her mother. (Ex. M, p. 20).

Petitioner was evaluated by two different experts—Dr. Woods and Dr. Jennisch—regarding a mental sequela allegedly arising from Petitioner's August 2018 work injury. Dr. Woods saw Petitioner at his request. Dr. Jennisch saw Petitioner at Respondents' request. Each doctor offered opinions regarding Petitioner's mental health.

Petitioner was evaluated for his mental health by Dr. Jennisch on April 16, 2021. (Ex. N). He relayed to Dr. Jennisch that he was getting along relatively well immediately after his injury, through his rehabilitation and during the eleven months he had returned to work without restriction. (Ex. N, p. 56). Petitioner also said he remained financially stable during his COVID-19 furlough, and his mental health remained stable through that time. (Ex. N, p. 56). Petitioner told Dr. Jennisch that losing his job in the fall of 2020 impacted his emotional health. (Ex. N, p. 56). Dr. Jennisch concluded that Petitioner losing his job was a blow to his self-esteem and caused isolation. (Ex. N,

p. 56). Petitioner also shared with Dr. Jennisch that the issues with his daughter caused him significant distress. (Ex. N, p. 56). Dr. Jennisch ultimately opined that Petitioner's daughter abruptly moving away while Petitioner was dealing with the downsizing of his position at Respondent NCI Building Systems led to the onset of Petitioner's psychiatric symptoms. (Ex. N, p. 58). Dr. Jennisch said Petitioner had symptoms consistent with an adjustment disorder, with depressive and anxious components. However, Dr. Jennisch would not causally relate these symptoms to Petitioner's August 2018 work injury. (Ex. N, p. 62). Dr. Jennisch said Petitioner might benefit from therapy related to the stress of his unemployment as well as the issues regarding his family dynamic and daughter's health. (Ex. N, p. 64). Dr. Jennisch noted that Petitioner was coping with his pain issues well until the added stressors were introduced into his life. (Ex. N, p. 64).

Dr. Woods diagnosed Petitioner with an adjustment disorder which he attributed to Petitioner's pain complaints. (Ex. 2, p.30). Dr. Woods opined that Petitioner could not be rated under the AMA Guidelines, and recommended additional therapy as well as medications. (Ex. 2, p. 31). Dr. Woods stated that as long as the underlying stressors remained present in Petitioner's life, Petitioner's adjustment disorder would persist. (Ex. 2, p. 31).

Dr. Jennisch commented on Dr. Woods' evaluation of Petitioner. Dr. Jennisch disagreed with Dr. Woods' assessment that Petitioner would have difficulties with employability, because Dr. Woods did not provide examples of day-to-day functioning suggesting Petitioner suffers from a severe psychiatric disorder. (Ex. N, p. 65). Dr. Jennisch opined that Petitioner was not restricted from activities due to his psychiatric condition. (Ex. N, p. 65). Dr. Jennisch also disagreed with Dr. Woods' assessment as to the permanence of any condition, stating that Petitioner's condition would not be permanent. (Ex. N, p. 65).

STANDARD OF REVIEW

Judicial review of an administrative agency action is governed by the Iowa Administrative Procedure Act, Iowa Code chapter 17A. An agency decision shall be reversed or modified if the agency decision is unsupported by substantial evidence, affected by error of law or is unreasonable, arbitrary or capricious. Iowa Code § 17A.19(8).

The district court is bound by the agency findings of fact if they are supported by substantial evidence when the record is considered as a whole. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). The Commissioner's application of law to fact is given a review that is a less deferential than that under substantial evidence and can reveal that the agency decision is affected by other grounds of error. *Id.* at 218-219 (citing Iowa Code § 17A.19(10)(*c*), (*i*), (*j*), (*m*)). The Commissioner is the trier of fact and is charged with assessing witness credibility, weighing the evidence, and deciding factual issues. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-395 (Iowa 2007).

The court will broadly and liberally apply the agency findings to uphold, rather than overturn, the agency decision. *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994). The reviewing court may disregard the agency's conclusions if it decides, after reviewing the entire record, that the direct and circumstantial evidence is so compelling that a reasonable mind would find the evidence inadequate to reach the same conclusions. *Ringland Johnson, Inc. v. Hunecke,* 585 N.W.2d 269, 272 (Iowa 1998). In terms of issues of substantial evidence, the record before the agency must be viewed as a whole to determine if there is substantial evidence to support the Commissioner's decision. *2800 Corp. v. Fernandez*, 528 N.W.2d 124, 126 (Iowa 1995). The court will reverse the Commissioner's application of law to fact if it is "irrational, illogical, or wholly unjustifiable." *Neal v. Annette Holdings, Inc.,* 814 N.W.2d 493, 518 (Iowa 2012) (quoting *Lakeside*

Casino v. Blue, 743 N.W.2d 169, 173 (Iowa 2007)).

To the extent a claim of error rests on statutory interpretation, the court's review is for correction of errors of law. *Wilson v. IBP, Inc.*, 589 N.W.2d 729, 730 (Iowa 1999). The Iowa Supreme Court (the Court) has determined that the Legislature has not delegated any special power to the Commissioner regarding statutory interpretation of Iowa Code chapter 85. Any interpretation of that statute will be reviewed for errors at law. *Waldinger Corp. v. Mettler, Inc.,* 817 N.W.2d 1, 4-5 (Iowa 2012).

ANALYSIS

A. <u>Duration and Source of Petitioner's Alleged Mental Health Condition</u>. Many of the issues on judicial review arise from the alleged mental health sequela (the adjustment disorder) that Petitioner claims is part of his work related injury. Among other things, Petitioner alleges that the agency improperly found his mental condition was not permanent, and erred in failing to award additional industrial disability or make an award of healing period benefits for his alleged mental condition.

1. Duration of Alleged Mental Health Sequela – Petition. Whether Petitioner's alleged mental health sequela is not permanent is a fact issue. This triggers a substantial evidence analysis under chapter 17A. Petitioner says the record establishes that his mental health condition—an adjustment disorder—is permanent. Respondents say it isn't, as the Commissioner found.

The court finds the record contains substantial evidence that, as the Commissioner found, Petitioner "has established that he sustained a sequela adjustment disorder caused by the August 2018 work injury." (App. Dec. p. 11). The Commissioner relies on Dr. Woods' opinion for his opinion. Dr. Woods' opinion does not establish that Petitioner's mental health condition is

permanent. His opinion regarding the duration of Petitioner's mental health issue is conditioned with an "if" clause after the initial finding: "[I]f [Petitioner's] chronic pain is not resolved his adjustment order 'will be permanent.'" (Ex. 2, p. 32; App. Dec. p. 9). Put another way, Dr. Woods indicates in his report that Petitioner's adjustment disorder will persist as long as the stressors in his life persist. That is not the same thing as saying Petitioner's adjustment disorder is permanent. The Commissioner's finding on this issue means that if Petitioner's chronic pain is resolved, and if Petitioner's stressors go away, Petitioner will no longer have a sequela disorder caused by the August 2018 work injury.

The "ifs" have not been resolved.[1] Reasonable minds could differ as to what reasonable inferences that could be drawn from this evidence. The Commissioner's determination that Petitioner's adjustment disorder may be resolved if his chronic pain and the stressors in his life go away is not unreasonable, arbitrary, capricious and an abuse of discretion.

The Commissioner's determination on the duration of Petitioner's adjustment disorder should be affirmed.

2. Source of Alleged Mental Sequela – Cross Petition. Respondents urge the Commissioner's finding that Petitioner has an adjustment disorder caused by his August 2018 work injury is unsupported by substantial evidence when the record is considered as a whole. They say the

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1 The "ifs" were not resolved at the time of the agency hearing. In addressing Petitioner's prognosis, Dr. Woods opined in part:

> . . . Given [Petitioner's] significant physical damage in this case, it's hard to say how much resolution he will be able to achieve and therefore it's unclear how much is psychiatric symptoms will be able to resolve.

(Cl. Ex. 2, p. 31).

evidence "overwhelmingly" supports a finding that Petitioner's adjustment disorder is not causally related to his August 2018 work injury. They urge reversal.

It is well-settled that medical causation is a question of fact vested in the sound discretion of the Commissioner. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 844 (Iowa 2011).

The weight to be given expert testimony will depend upon "the accuracy of the facts relied upon by the expert and the surrounding circumstances." *Pease*, 807 N.W.2d at 845 (internal quotation omitted). An expert opinion will not necessarily be binding on the Commissioner if that opinion is based upon an incomplete or incorrect history. *Id. (citing Dunlavey v. Economy Fire & Casualty Co.,* 526 N.W.2d at 853). An expert's opinion must be grounded in fact over conjecture. *Ganrud v. Smith*, 206 N.W.2d 314 (Iowa 1973). If there is insufficient data for an expert to make a judgment or form an opinion that is more than mere conjecture, the opinion should be excluded. *City of Oelwein v. Bd. of Trs. of the Mun. Fire & Police Ret. Sys. of Iowa*, 567 N.W.2d 237, 238 (Iowa Ct. App. 1997).

Respondents argue that the Commissioner ignored pertinent facts. They say the Commissioner turned the treatment recommendations of Dr. Wikle into an opinion or support for causation of Petitioner's mental health condition. They go to great lengths to discredit the information in the record that the Commissioner relied upon:

> The Commissioner finds a few stray references to being seen or evaluated for a mental health issue and turns this into a supportive causative opinion or documentation that the mental health condition would be related to Petitioner's work injury. This is not the case, as discussed regarding the opinions of Dr. Wikle and Ph.D. Tallman. The medical records do not disclose any serious mental health concerns until after Petitioner was let go due to COVID-19, and Petitioner's daughter became a significant stressor in his life. It is fully consistent with the records, and the opinions of Dr. Jennisch, that the work injury, and Petitioner's physical condition after the work injury, were not a substantial factor causing his mental health issue.

> The Commissioner looks to have allowed Petitioner to prevail on this issue based upon the alleged work injury being merely a factor, but based upon the correct standard the record as a whole does not disclose that the alleged injury was a substantial contributing factor in causing the mental health issues experienced by Petitioner. The contrary finding should be reversed.

The long story short is that the Commissioner is entitled to rely upon evidence in the record that he deems credible after weighing it and assessing witness credibility. The Commissioner reasonably chose to believe Dr. Woods' opinion on causation because he found it more persuasive than Dr. Jennisch's opinion. (App. Dec. p. 12). He further observed that "[n]o physician or psychiatrist has opined [that Petitioner's] mental health condition is permanent." (App. Dec. p 13).

The Commissioner's determination on this issue should be affirmed.

3. Increase in Industrial Disability Award. Petitioner contends that his mental condition mandates an increase in the Commissioner's award of industrial disability. The only doctor assigning permanent work restrictions for Petitioner's alleged work injury was his own independent medical examiner, Dr. Taylor. Similarly, the only doctor opining that Petitioner's mental condition would impact Petitioner's ability to work is Dr. Woods. Dr. Jennisch said Petitioner's mental condition would not be disabling or result in any work restrictions and would not be permanent. (Ex. B, p. 65) The agency so found in the Appeal Decision. This is sufficient evidence to deny any further industrial disability award.

The agency is not required to discuss every single finding or all applications of law to the facts. It need only provide a decision detailed enough to permit a reviewing court to work backwards to determine the findings required to be made. *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 540, 560-561 (Iowa 2010). Further, reviewing courts are tasked with trying to uphold agency findings of fact and applications of law to facts. *Coghlan v. Quinn Wire & Iron Works*, 164 N.W.2d

848, 852 (Iowa 1969); *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009); *Christensen v. Iowa Bd. of Educ. Exam'rs*, 831 N.W.2d 179, 192 (Iowa 2013). Here the court finds no reason to disturb the agency findings based upon the alleged mental sequela as urged by Petitioner.

The Commissioner's determination on this issue should be affirmed.

4. Running Healing Period Benefits. Petitioner urges entitlement to healing period benefits for his alleged mental sequela. There is no discussion on the record, or indication in the Hearing Report, that Petitioner was raising any issue about healing period, temporary total, or temporary partial disability benefits when this case was submitted to the Deputy for determination. (Hr'g. Rep.). No basis permits Petitioner to raise any issue about healing period benefits, or argue for an award of running healing period benefits on appeal. The issue was not raised at the agency hearing. The issue was not submitted by Petitioner in his intra-agency appeal to the Commissioner. This issue first appeared in a Motion for Rehearing after the Commissioner issued the Appeal Decision.

The court considers this issue waived because Petitioner has not preserved error.

5. Commissioner's Admission of Dinoff Report – Cross Petition. Respondents assign error regarding the Commissioner's late admission and consideration of an evaluation report for Petitioner as it relates to Petitioner's adjustment disorder. Ph.D. Beth Dinoff evaluated Petitioner and authored an evaluation report after the administrative hearing before the Deputy was completed. In reversing the Deputy's finding that Petitioner did not suffer a mental sequela of his work related injury, the Commissioner based his finding in part on Ph.D. Dinoff's post-agency-hearing evaluation report.

Respondents essentially urge they were prejudiced by the late receipt and use of this report by

the Commissioner. Plaintiff represents that this cannot be the case since the reason for late submission of the evaluation report by Petitioner was that Respondents kept stalling on this issue. They were aware this report was pending at the time of the agency hearing because they scheduled, and then cancelled, the original evaluation appointment.

Respondents cite to several relevant administrative rules. The court finds these rules apply in normal circumstances, where the party asserting prejudice has not already engaged in conduct prejudicial to the opposing party. It would be fundamentally unfair for Respondents to profit from a situation they created by finding that the Commissioner erred on this issue and the Dinhoff report should be excluded as they request.

The Commissioner's determination on this issue should be affirmed.

B. **Commissioner's Award of 40% Industrial Disability Benefits**. Respondents say the agency erred in finding an industrial disability rather than a scheduled member injury, or in the alternative that only the functional disability ratings should have been awarded. Respondents further argue that even if the case is an industrial one, the award should be reversed.

Injuries are divided into scheduled and unscheduled injuries. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 320 (Iowa 1998); *Mortimer v. Freuhauf Corp.*, 502 N.W.2d 12, 14-15 (Iowa 1993). In determining whether an injury will be compensated as a scheduled member or as an industrial disability, it is the situs of the disability or permanent injury that determines whether the injury will be scheduled or unscheduled. *Lauhoff Grain v. McIntosh*, 395 N.W.2d 834, 840-841 (Iowa 1986); *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 290, 110 N.W.2d 660, 663-664 (1961). A scheduled injury is evaluated on a functional basis. *Miller v. Lauridsen Foods, Inc.,* 525 N.W.2d 417, 420 (Iowa 1994)). Functional disability is arrived at by determining the loss of physiological capacity of

the body part. *Id.* (citing *Second Injury Fund of Iowa v. Shank*, 516 N.W.2d 808, 815 (Iowa 1994)). The functional disability rating is to be determined solely utilizing the *AMA Guides to Permanent Impairment* as adopted by the Commissioner. Iowa Code § 85.34(2)(*x*). Lay testimony or agency expertise are not to be used in determining the percentage of loss for a scheduled impairment. *Id.*

Industrial disability is designed to measure a worker's loss of earning capacity. *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 265 (Iowa 1995). The factors taken into account in determining the industrial disability of an injured worker are age, intelligence, education, qualifications, experience, and the ability of the injured worker to engage in the employment for which he or she is suited. *Id.* at 266. The focus of the inquiry will not be on what the worker can and cannot do, but on the ability of the worker to be gainfully employed. *Id.*

A permanent and total disability means that the injured worker is wholly disabled from performing work that his or her experience, training, education, intelligence, and physical capabilities would otherwise permit. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 182 (Iowa 1980). In evaluating whether Petitioner has a permanent and total disability, the question is whether there is a job for which Petitioner could realistically compete in the labor market. *Second Injury Fund of Iowa v. Shank*, 516 N.W.2 808, 815 (Iowa 1994).

Petitioner bears the burden of showing the work-related injury is the proximate cause of Petitioner's disability. *Ayers v. D & N Fence Co., Inc.,* 731 N.W.2d 11, 17 (Iowa 2007). For a cause to be proximate, it must be a substantial factor in bringing about the result. *Id.* A probability of causation must exist rather than a mere possibility of causation. *Id.; Frye v. Smith-Doyle Contractors*, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

Issues of causal connection between a condition and the alleged injury are within the domain

of expert testimony. *Dunlavey v. Econ. Fire &Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). The Court has held that an expert opinion, even uncontroverted, may be accepted or rejected by the Commissioner. But in the case of unrefuted expert opinions, the Court has applied greater scrutiny. *Sondag v. Ferris Hardware*, 220 N.W.2d 903, 907–908 (Iowa 1974).

In their response to Petitioner's Request for Admissions, Respondents admitted that Petitioner suffered an industrial disability. Petitioner also suffered a compression fracture deformity at T5 which was rated at 5% impairment to the body as a whole by Dr. Taylor. No contrary rating was offered by Respondents. The law is clear that when an injured worker has both a scheduled member injury and an injury to the body as a whole, their disability is determined under the industrial disability analysis. *Lauhoff Grain Co*., 395 N.W.2d 837-39; *Barton*, 253 Iowa at 291-93; 110 N.W.2d at 664.

Respondents urge that Petitioner's return to the same job for less than six months before being terminated disqualifies him from the industrial disability analysis. When this issue is considered in conjunction with the requirements of Iowa Code section 85.34(2)(*v*), whether an award is based upon functional ratings or an industrial disability analysis should depend upon the claimant's condition and earnings at the time of the administrative hearing.

Here, Petitioner did not return to work at the same or higher wages than he earned at the time he was injured in August 2018. By the time of the administrative hearing, Respondents had terminated Petitioner. Logic and fairness should require that the post-injury snapshot of Petitioner's salary, wages or earnings should occur at the time of the administrative hearing, like industrial disability is measured. Performing the comparison based upon a claimant's initial return to work could lead to unfair and illogical results. *Sherwin-Williams Co. v. Iowa Dep't of Revenue*, 798

N.W.2d 417, 427 (Iowa 2020) (finding departure from literal construction is justified when such construction would produce an absurd or unjust result and literal construction under the specific facts is clearly inconsistent with the purposes and policies of the act).

Mental health conditions arising out of a physical injury are body as a whole injuries compensated under the industrial disability method. *Stewart v. Franzen Transp*., File No. 5008268 (2004). The employer is liable for all consequences naturally and proximately flowing from the accident. *Oldham v. Scofield*. 266 N.W. 480, 482 (Iowa 1936). This includes a physical injury materially aggravating an underlying mental health issue. "Whether the spillover effects are physical or mental, the result is the same: disability." *Mortimer v. Fruehauf Corp*., 502 N.W.2d 12, 13 (Iowa 1993).

The Commissioner's determination that Petitioner sustained an industrial injury is supported by the record when it is considered as a whole. Further, the Commissioner's award of 40% industrial disability reasonably takes into account Petitioner's adjustment disorder. This award is reasonable under the record as a whole.

The Commissioner's determination on this issue should be affirmed.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Commissioner's determination that Petitioner sustained an adjustment disorder (a mental health sequela) as a result of a work injury in August 2018 is affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commissioner's determination that the adjustment disorder is not permanent is affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commissioner's

determination that Petitioner sustained an industrial disability is affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that for the reasons stated above, Petitioner's running healing period benefits issue is waived because it was not preserved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commissioner's admission of Ph.D. Dinoff's evaluation report into the administrative record and his consideration of the report is affirmed

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commissioner's determination that Petitioner sustained a 40% industrial disability is affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any costs associated with this judicial review proceeding are taxed equally to Petitioner and Respondents.

State of Iowa Courts

Case Number	**Case Title**
CVCV064652	DONALD TURNER V NCI BUILDING SYSTEMS AND LIBERTY
Type:	ORDER FOR JUDGMENT

So Ordered

Jeanie Kunkle Vaudt

Jeanie Vaudt, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2023-06-06 20:09:53