BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUSTIN DOTY,

Claimant,

vs.

CLEARLY BUILDERS CORPORATION,

Employer,

and

ZURICH NORTH AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5047129

A R B I T R A T I O N

D E C I S I O N

Head Note Nos.: 1801.1, 1803, 2701, 3001

STATEMENT OF THE CASE

Claimant, Justin Doty, filed a petition in arbitration seeking workers' compensation benefits from Cleary Builders Corporation, employer, and Zurich North American Insurance Company, insurance carrier, both as defendants, as a result of a stipulated injury sustained on January 15, 2010. This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on April 6, 2015, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 through 15, defendants' exhibits A through K, and the testimony of the claimant. The parties submitted post-hearing briefs, the matter being fully submitted on May 5, 2015.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant is entitled to additional healing period benefits from January 16, 2010 through May 11, 2010;

2. Whether claimant is entitled to temporary partial disability benefits from May 12, 2010 through August 23, 2010;

3. The extent of claimant's industrial disability;

4. The proper rate of compensation;

5. Whether claimant is entitled to reimbursement of an independent medical examination pursuant to Iowa Code section 85.39;

6. Whether claimant is entitled to alternate care under Iowa Code section 85.27, in the form of ongoing psychiatric and/or psychological care; and

7. Whether defendants are entitled to credit under Iowa Code section 85.34.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record and his deposition testimony. His demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant's physical presentation was consistent with an individual with complaints of depression and anxiety, including nervously rubbing his hands, speaking rapidly, and bordering on the verge of tears throughout the entirety of his testimony which followed discussion of his mental health conditions. Claimant is found credible.

Claimant was 30 years of age on the date of evidentiary hearing. He resides in Humboldt, Iowa. He is single and a father to three minor children. Claimant dropped out of high school; he did not subsequently earn a high school diploma or GED. (Claimant's testimony; Exhibit F, page 1) Claimant's employment history includes work at a pizza restaurant, restaurant cook and kitchen manager, construction, sales, manufacturing, maintenance, and certified lawn chemical applicator. His hourly earnings in such positions generally fell within the $10.00 to $12.00 range. (Ex. 12, pp. 1-2; Ex. F, p. 2)

On September 1, 2009, claimant applied for work as a laborer at defendant-employer. (Ex. 11, p. 1; Ex. K, p. 1) Defendant-employer hired claimant on October 8, 2009, at an hourly wage of $11.00. (Ex. 11, pp. 7-8) In conjunction with employment paperwork completed October 9, 2009, claimant expressed interest in lead man, foreman, and field supervisor positions. (Ex. 11, p. 5) Claimant testified at the time of his hire, he was to serve as a construction crew member, but was in line to become a lead man and foreman due to his past foreman experience. Claimant testified he was informed his starting hourly wage would be $12.00 per hour and he would receive an additional $1.00 per hour upon obtainment of a lead man position. Claimant testified when he received his first paycheck, he had been paid at $11.00 per hour. Claimant testified he spoke with his supervisor, who stated claimant would receive a raise to $12.00 per hour in 30 days. However, claimant testified he never received this raise, as promised. (Claimant's testimony)

Claimant indicated the crew at defendant-employer built large buildings, a task which required heavy, physical labor. Claimant testified laborers wore tool belts which could weigh 60 to 70 pounds and would easily lift 100 to 150 pounds. Claimant testified there was no maximum weight laborers were required to lift; if one were unable to lift an item alone, coworkers would assist. (Claimant's testimony)

Claimant testified he typically arrived at defendant-employer at 7:00 a.m. He would then participate in a morning meeting and travel to a job site. Claimant testified he was not paid for these hours, and it was not uncommon for him to not receive paid hours until 10:00 a.m. Claimant testified he would not return home until 7:00 p.m. Claimant testified employees did not clock in or out, as the foreman reported hours to defendant-employer. He testified he consistently worked 5 to 6 days per week, with a minimum of 60 hours worked, but he was only paid for 40 hours per week. Claimant testified a lawsuit is pending versus defendant-employer related to underpaying employees in this manner. (Claimant's testimony)

Defendants' exhibits include claimant's paycheck registers for the period of October 12, 2009 through December 31, 2009. The documents reveal the following:

Period End Date	Hours (+ overtime hours)	Taxable Gross
October 17, 2009	11	$121.00
October 24, 2009	28	$308.00
October 31, 2009	25	$275.00
November 7, 2009	40 (+5)	$522.50
November 14, 2009	40 (+19.5)	$761.75
November 21, 2009	17	$187.00
November 28, 2009	10	$110.00
December 5, 2009	33	$363.00
December 12, 2009	20	$220.00
December 19, 2009	25	$275.00
December 26, 2009	16	$176.00

(Ex. G, pp. 1-3)

On January 15, 2010, claimant testified the crew was tasked with setting trusses on a building. As he attempted to descend the building, claimant testified the board on which he stood broke and he fell 18 feet to the ground, landing upon his buttocks. Claimant testified he felt a sharp pain throughout his body; his coworkers were eventually able to remove his heavy work gear and assist him back to the work truck. The crew drove back to defendant-employer's shop, where claimant reported the injury to his supervisor. Claimant's girlfriend picked him up outside defendant-employer's shop and drove him to the emergency room. (Claimant's testimony)

Records from Humboldt County Memorial Hospital (HCMH) dated January 15, 2010 reveal claimant was evaluated by David Ruzicka, D.O. and Laine Dvorak, M.D.

Following CT, claimant was found to have sustained compression fractures at T11 and T12. Claimant was placed in a splint and admitted to the hospital for pain management and bed rest. (Ex. 2, pp. 1, 5-6, 17)

On January 18, 2010, Dr. Dvorak discharged claimant to his home. Claimant was directed to continue with therapy, utilize prescription pain medication and muscle relaxers, wear a back brace, and perform no driving or heavy lifting. Dr. Dvorak advised claimant to return for follow up, as well as to present for evaluation with Mark Palit, M.D. (Ex. 2, pp. 17, 20-21)

The following day, January 19, 2010, claimant presented to orthopedic surgeon, Dr. Palit for evaluation. Claimant reported the back brace provided by the hospital was uncomfortable. Dr. Palit ordered claimant be fitted for a custom thoracolumbosacral orthosis. He also provided claimant a cane, toilet riser, and shower bench. Dr. Palit removed claimant from work for 12 weeks and directed claimant to telephone if he was in need of additional pain medication. (Ex. 6, pp. 1-2)

Claimant followed up with Dr. Dvorak on February 1, 2010 at Family Medicine-Humboldt. Dr. Dvorak provided continued medication management and advised claimant to continue care with Dr. Palit. (Ex. 3, pp. 1-2) Claimant continued to follow up periodically with Dr. Palit, including on February 16, 2010 and March 23, 2010. (Ex. 6, pp. 6, 9)

On April 10, 2010, claimant presented to Trinity Regional Medical Center (TRMC) with complaints of anxiety and chest pain earlier in the day. He was provided with Lorazepam. (Ex. 7)

At an appointment on April 22, 2010, Dr. Palit ordered a course of physical therapy to focus upon stabilization and strengthening of claimant's back. He advised claimant to wean off the back brace and follow up in two weeks. Dr. Palit also noted claimant reported feelings of panic, anxiety, and hopelessness with respect to the injury. Dr. Palit discussed these complaints with claimant's case manager, who indicated she would locate a psychiatrist to evaluate claimant. (Ex. 6, p. 13)

On May 11, 2010, claimant returned to Dr. Palit. Dr. Palit's notes indicate claimant walked in carrying his daughter, without difficulty. At the time of evaluation, claimant had weaned from the back brace but remained in physical therapy. Dr. Palit released claimant to light duty work, consisting mainly of clerical or office work, with no lifting over 12 pounds. (Ex. 6, p. 17)

Claimant was off work as a result of the work injury from January 16, 2010 through May 11, 2010. (Ex. 11, p. 15) During the first two weeks, from January 16, 2010 through January 29, 2010, claimant received healing period benefits at the rate of $298.03, issued to claimant. From January 30, 2010 through May 7, 2010, defendants paid weekly healing period benefits as follows: $295.72 to claimant and $2.31 to "collection services", for a total weekly payment of $298.03. Defendants also paid

healing period benefits from May 8, 2010 through May 11, 2010 in the amount of $168.98 to claimant and $1.32 to collection services. (Ex. I, pp. 1-6) Defendant-insurance carrier subsequently authored a letter to claimant's attorney explaining claimant's gross average weekly wage had been calculated as $440.00, and given claimant's marital status and exemptions, his rate of compensation would be $298.03. (Ex. 10, p. 1)

Claimant returned to work on light duty effective May 12, 2010. (Ex. 11, p. 15) Claimant testified when he returned to defendant-employer on light duty, defendant-employer had no constructive work for him to perform. Rather, claimant sat in an office for eight hours per day and often resorted to playing computer games. Claimant testified he had been anxious about returning to work after months off. He then began to develop nervousness about presenting to work and started suffering with chest pain. Claimant testified he was asked to return to more typical work duties, including setting trusses, but claimant was scared to do so. Claimant explained at this time, he was experiencing frequent panic attacks and these attacks could occur at any place, even the grocery store. (Claimant's testimony)

Claimant participated in physical therapy for his back complaints from April to June 2010. At the conclusion of the course of therapy, claimant was discharged with a home exercise program. (Ex. 4, pp. 1-14)

On June 11, 2010, claimant presented to the HCMH Emergency Department. Records describe claimant as anxious, shaking, and with rapid speech, following a panic attack which began while at work. Sherry Bulten, M.D. noted a chief complaint of a panic attack, with claimant reporting suffering with recurrent panic/anxiety attacks since the work fall in January 2010. Claimant expressed worry over such episodes, as they remind him that his father and grandfather both suffered with heart disease. Dr. Bulten noted claimant was experiencing several issues at work and in his personal life, including a custody battle over his son. Dr. Bulten assessed a panic attack and chronic anxiety. Her notes indicate claimant had previously received Lorazepam from the emergency department at TRMC, which provided relief. Dr. Bulten prescribed Zoloft to be used daily and Xanax on an as-needed basis for anxiety. Dr. Bulten also noted an appointment with Dr. Lee was pending. (Ex. 2, pp. 22-24)

On June 14, 2010, claimant presented to Dr. Dvorak. Dr. Dvorak directed claimant not to mix alcohol with his Zoloft and Xanax prescriptions and advised claimant to follow up with Dr. Lee. (Ex. 3, p. 3; Ex. 9, p. 2)

Claimant returned to Dr. Palit on June 15, 2010. Following examination, Dr. Palit lessened claimant's restrictions to allow for no lifting greater than 25 pounds, with claimant no longer limited to office work. Dr. Palit also recommended claimant follow through with a mental health evaluation. Claimant's case manager indicated claimant had been late to a scheduled evaluation and the provider refused to see claimant; however, she also advised Neerja Kakade, M.D. was available to evaluate claimant. (Ex. 6, p. 20)

Defendant-employer's records of June 22, 2010 indicate claimant was limited to work only on the ground, as opposed to at heights. (Ex. 11, p. 22)

On July 7, 2010, claimant began seeing licensed social worker, Kris Marvin. Mr. Marvin authored a letter dated July 13, 2010, by which he opined claimant was suffering with anxiety issues related to the fall at work in January 2010. Mr. Marvin expressed concern with respect to claimant's release to return to work, specifically on roofs. Mr. Marvin opined such work would prolong claimant's anxiety, delay his return to full duty, and put claimant in danger, as claimant would be unable to concentrate. Mr. Marvin recommended claimant continue to work, but only do so at heights such as side walls. He described this restriction as temporary in nature, designed to allow claimant to rebuild his confidence. (Ex. 8, p. 1)

On July 13, 2010, Dr. Palit opined claimant had achieved maximum medical improvement (MMI) and released claimant to regular duty. (Ex. 6, p. 22) Defendant-employer's records of that date reveal claimant was released to full duty, without restrictions. (Ex. 11, p. 23)

Defendants paid temporary partial disability benefits intermittently from May 12, 2010 through July 14, 2010 in the amount of $638.00. (Ex. I, p. 6)

On July 20, 2010, claimant presented for an initial evaluation with psychiatrist, Dr. Kakade. Dr. Kakade diagnosed a generalized anxiety disorder and recommended continued psychotherapy, as well as use of prescription Xanax and Lexapro. (Ex. 8, pp. 7-11)

Claimant continued to receive care with Mr. Marvin. On August 5, 2010, Mr. Marvin authored a letter opining claimant suffered with anxiety due to the back injury and resultant concern regarding a potential permanent handicap and an inability to provide for his family. Mr. Marvin indicated claimant's anxiety manifested as a fear of re-injury. Mr. Marvin opined it would take time for claimant to learn the skills needed to manage his thoughts and eliminate the anxiety. Accordingly, Mr. Marvin requested additional sessions in order to assist claimant in reaching full employment status. (Ex. 8, p. 2)

On August 20, 2010, claimant's attorney authored a letter to the claims representative at defendant-insurance carrier managing claimant's claim. Counsel indicated defendant-employer had paid claimant fewer hours than he worked and had threatened to lower his hourly wage. (Ex. 13, p. 1) Counsel also indicated manager, Mr. McDermott, had informed claimant that defendant-employer would no longer pay for claimant's mental health treatment, including the recommended medications or counseling sessions. Counsel represented claimant had telephoned his psychologist's office and received confirmation that additional care had been denied. Counsel requested clarification of defendant-insurance carrier's position on this matter. (Ex. 13, p. 2)

Mr. Marvin authored a letter dated August 24, 2010. By his letter, Mr. Marvin specified claimant's diagnosis as generalized anxiety disorder due to the back injury. Mr. Marvin explained he and claimant were utilizing cognitive-behavioral therapy in treatment of his conditions, a method Mr. Marvin opined takes months for patients to learn. Mr. Marvin expressed concern claimant's employer had refused to pay for ongoing treatment, describing treatments as imperative in allowing claimant to return to a full level of function. Mr. Marvin also expressed belief this ongoing care was the employer's responsibility to provide. (Ex. 8, p. 4)

Claimant returned to Dr. Palit on August 24, 2010. Claimant reported he had returned to regular duty and suffered with some aches and pains. Dr. Palit indicated claimant may have occasional increased aches and pains, but claimant was not at significant risk of causing further damage. Dr. Palit opined claimant could continue to work full duty and advised claimant to return as needed. (Ex. 6, p. 24)

On November 18, 2010, Dr. Palit authored a record opining claimant had reached MMI as of August 24, 2010. Due to the compression fractures, Dr. Palit opined claimant sustained a combined impairment of 19 percent whole person. (Ex. 6, p. 28; Ex. C, p. 1)

Over time, claimant testified he became frustrated with his treatment by defendant-employer. Claimant testified he had been hired as a foreman-in-training, but never received the promotion anticipated, and his hourly wage was not increased to $12.00, as promised. Despite not paying claimant $12.00 per hour, claimant testified defendant-employer began to hire laborers without experience at $12.00 per hour. Accordingly, claimant testified he requested the $1.00 raise he had been promised; when he ultimately received a raise, however, it was only for an additional $.50 per hour. Claimant testified he confronted his supervisor and was told to leave if he did not like his pay. While supervisor, Mr. McDermott admitted the amount of the raise was in error, claimant testified Mr. McDermott indicated claimant would have to wait for the additional raise amount and he would not pay claimant the $.50 per hour in back pay. Claimant testified he left and never returned to work at defendant-employer. Claimant did not file for unemployment benefits. (Claimant's testimony)

Claimant's last date of employment at defendant-employer was December 7, 2010. (Ex. 11, p. 24; Ex. 12, p. 1; Ex. F, p. 2) Defendant-employer's record entitled Notice of Termination is signed by manager, Mr. McDermott. On this form, Mr. McDermott denoted the severing of employment as a voluntary termination. Mr. McDermott's handwritten notes indicate claimant was upset his raise was only $.50 per hour. Mr. McDermott wrote he admitted his mistake to claimant and represented he would correct the error, but claimant later reentered his office and stated "I quit." (Ex. K, p. 2)

On January 14, 2011, defendants issued claimant a check for permanent partial disability benefits for the period of May 12, 2010 through January 25, 2011. The payment log denotes this check as payment for 37 weeks of permanent partial disability

benefits, plus interest. (Ex. I, p. 6) Defendants then commenced payment of weekly permanent disability benefits. Such benefits were paid from January 26, 2011 until June 19, 2012. However, these benefits were paid at a rate of $232.43 per week. (Ex. I, pp. 6-18)

On February 7, 2011, claimant presented to Dr. Dvorak with complaints of chest pain and tightness of his chest. Claimant described the pain as different than with prior panic attacks. Dr. Dvorak noted claimant was concerned he may have heart disease. Claimant reported he loved his new job and felt as if his panic attacks were under control. Dr. Dvorak opined claimant's complaints could be musculoskeletal, could be related to his anxiety, or could be cardiac in nature. (Ex. 3, pp. 5-6)

On October 31, 2011, claimant presented to the HCMH Emergency Department with pain of the lower abdominal area following moving equipment the prior day. Claimant was assessed with an abdominal wall sprain and was removed from work for a few days. Claimant was directed to use ibuprofen, Vicodin, a heating pad, and rest the area. (Ex. 2, pp. 27-28)

On March 7, 2012, claimant returned to Dr. Dvorak for a refill of his anxiety medication. During the evaluation, claimant also reported falling off a three-wheeler on March 4, 2012, landing upon his tailbone. Claimant complained of tenderness of the low back and buttock areas. Dr. Dvorak indicated these complaints should heal with time. (Ex. 3, pp. 7-8)

While claimant admitted he fell from a three-wheeler, claimant denied any injury. Claimant testified the accident occurred while he was attempting to show a prospective purchaser how to start the vehicle. Claimant explained the three-wheeler belonged to his children, but he was attempting to sell it for financial reasons. Claimant indicated he did not seek medical attention and only mentioned the incident to Dr. Dvorak in discussion when he sought care for unrelated reasons. (Claimant's testimony)

On April 26, 2013, claimant returned to Dr. Dvorak with complaints of anxiety, depressed mood, lack of interest or pleasure in activities, difficulty sleeping, weight gain, lack of energy, feelings of worthlessness and guilt, and impaired concentration. Dr. Dvorak noted significant stressors in claimant's life, including the separation of a relationship and his responsibilities to care for his children and mother. Dr. Dvorak opined claimant scored a 17 PHQ Depression Score, with scores in the range of 15 to 19 points categorized as Major Depression, moderate. Dr. Dvorak diagnosed depression and prescribed escitalopram, with continued use of alprazolam for anxiety. (Ex. 3, pp. 9-10)

Claimant returned to Dr. Dvorak on June 14, 2013. Claimant denied depressed feelings and relayed overall improvement in his complaints. Claimant indicated he no longer took escitalopram, but continued taking alprazolam. (Ex. 3, p. 11)

On August 18, 2013, Mr. Marvin answered a series of questions posed by claimant's counsel. Mr. Marvin agreed defendant-employer never funded treatment after August 2010, at which time he last saw claimant. At the time of the last session, Mr. Marvin indicated he recommended further treatment. He agreed claimant attempted to get further treatment with Mr. Marvin, but his employer refused to pay. (Ex. 8, pp. 5-6)

Claimant returned to Dr. Palit on November 14, 2013 with reports of mid and low back pain. Due to claimant's continued reports of pain with lifting, Dr. Palit recommended a functional capacity evaluation (FCE) to determine claimant's abilities and limitations. (Ex. 6, p. 26)

On December 13, 2013, claimant underwent the recommended FCE at Short Physical Therapy. The therapist found claimant demonstrated maximum, consistent effort, behavior, and performance. (Ex. 5, p. 1; Ex. B, p. 1) The results of the FCE revealed moderate limitations in claimant's standing tolerance, stair/ladder climbing, and walking tolerance. It also revealed significant deficits in lifting/carrying, pushing/pulling, and positional tasks, specifically elevated work and forward bending. Overall, the therapist opined claimant was found capable of functioning within the medium physical demand category, with a maximum rare lift of 50 pounds on short and front carry. (Ex. 5, pp. 2-3; Ex. B, p. 2)

Claimant returned to Dr. Palit on February 6, 2014 for review of the FCE results. On that date, claimant reported pain at a level 2 on a 10-point scale. Dr. Palit opined claimant was doing well and had achieved MMI. Dr. Palit released claimant to return to work under restrictions as set forth in the FCE, which had placed claimant in the medium work category. (Ex. 6, p. 29; Ex. E, p. 1)

Claimant's medical records indicate claimant rode on a lawnmower on or about October 15, 2014. The lawnmower was bumpy, with the bouncing progressively causing claimant to become sore. However, on one instance, claimant landed hard and felt an electrical sensation from his hips to his neck and arms. At referral of Keri Benjamin, ARNP, claimant participated in physical therapy at HCMH. (Ex. 2, pp. 29) These sessions focused on claimant's back and took place in October and early November 2014. (Ex. D, pp. 3-4) On November 4, 2014, the therapist telephoned claimant and claimant reported his back had improved and had returned to the baseline level, described as tense. (Ex. 2, p. 29)

At the arranging of claimant's attorney, on November 14, 2014, claimant presented for independent medical evaluation with physiatrist, Farid Manshadi, M.D. Dr. Manshadi issued a report of his findings and opinions dated December 15, 2014. As part of his evaluation, Dr. Manshadi reviewed medical records and provided a brief summary of claimant's medical care. (Ex. 1, pp. 1-2) He also interviewed claimant, at which time claimant complained of back pain at a constant level of 3 to 4 on a 10-point scale, but with the potential to reach level 10 with activities like bending, twisting, and lifting. Claimant reported modifying the manner in which he performs activities and self-

treating with use of ibuprofen. Dr. Manshadi also noted claimant continued to complain of PTSD symptoms such as nocturnal waking and anxiety/panic attacks with heights and in social situations. Dr. Manshadi performed a physical examination, with his findings noted in one paragraph of his report. (Ex. 1, p. 3)

Following records review, interview and examination, Dr. Manshadi assessed chronic back pain with reduced thoracic and lumbar range of motion; status post fall at work on January 15, 2010, resulting in compression fractures at T11 and T12; anxiety and panic attacks; and symptomatology for PTSD. In a one-sentence opinion, Dr. Manshadi causally related all of these diagnoses to the work injury. (Ex. 1, p. 3) Dr. Manshadi opined claimant achieved MMI for his back condition as of December 13, 2013, but opined claimant had not achieved MMI relative to his psychological condition. (Ex. 1, p. 4) He recommended further treatment consisting of continued use of pain medications such as ibuprofen for back complaints, as well as psychiatric and/or psychological counseling. (Ex. 1, pp. 3-4)

Dr. Manshadi offered opinions on claimant's need for permanent restrictions and extent of permanent disability, but opined further psychiatric care may result in improvement, which may warrant modification of the recommended restrictions or impairment rating. (Ex. 1, p. 4) With this caveat, Dr. Manshadi opined claimant sustained an 18 percent whole person impairment as a result of the compression fractures and a 4 percent whole person impairment as a result of claimant's panic disorder, anxiety, and PTSD symptomatology, per the AMA Guides to the Evaluation of Permanent Impairment, Chapter 4. (Ex. 1, p. 4) Dr. Manshadi adopted the FCE restriction of a 50-pound maximum lift on a rare basis, and also recommended avoidance of work at heights and repetitive bending, stooping, or twisting of the back. (Ex. 1, p. 4)

On February 9, 2015, defendants authorized claimant to return to Mr. Marvin for further evaluation and treatment of his mental health complaints. Claimant was directed to contact Mr. Marvin's office to schedule the evaluation. (Ex. 10, p. 3; Ex. J, p. 1) Claimant testified he scheduled a repeat evaluation, but was forced to reschedule due to weather. While he had not returned to Mr. Marvin at the time of evidentiary hearing, he testified a return appointment has been scheduled. (Claimant's testimony)

After claimant's employment at defendant-employer ended, claimant worked in manufacturing, construction, sales, maintenance, and as a lawn chemical operator on two occasions. (Ex. 12, pp. 1-2; Ex. F, p. 2) Immediately following his termination from defendant-employer, claimant worked in manufacturing as a line worker and tack welder, tasked with building metal tool boxes. He described the work as physical, requiring lifting, bending, maneuvering of parts and a suspended tack welder, and grinding parts on an industrial grinder. Claimant testified such work caused him difficulty as a result of prolonged bending and movement of the torso. However, the company employed an on-site masseuse which claimant was able to utilize weekly. Claimant earned $13.00 per hour, plus benefits. However, claimant testified the work

was too physically demanding, and he ultimately voluntarily left employment after approximately eight months. (Claimant's testimony)

Claimant testified he then attempted to return to construction work with a former employer. He was placed in a foreman position, with the ability to delegate tasks, but was unable to maintain such work due to development of stiffness and electrical sensations throughout his body. Claimant also testified he suffered with a great deal of social anxiety in this position. Claimant testified he loves construction work, but became unable to do the lifting and climbing required. His employment ultimately ended when the company went out of business. (Claimant's testimony)

Claimant testified he subsequently earned his chemical operator certification, which allowed him to apply chemicals to lawns. He described the certification testing as difficult, requiring him to retake the examinations multiple times. Claimant secured employment as a chemical applicator; he earned approximately $11.00 per hour. He left this employment to return to construction work for higher wages. (Claimant's testimony)

When he returned to construction work, it was as a crew member. He earned $13.00 to $13.50 per hour. Claimant testified he took on more in terms of this employment than he was capable of performing, and he ultimately left this employer due to personality conflicts with the owner. (Claimant's testimony)

Claimant then worked as a sales associate at a garden center. He began as a part-time employee, but eventually transitioned to full-time employment. During this period, he also worked part time as a waiter at a hotel restaurant. When the hotel opened a position for a full-time maintenance employee, claimant was given the position. He attempted to continue part-time work at the garden center, but was not permitted to transition from full-time to part-time employment. In his maintenance position, claimant was required to perform a variety of maintenance tasks around the hotel and in-room. Claimant testified it was difficult for him to enter patron's rooms due to nervousness and resultant panic attacks. Claimant was provided with an assistant; claimant testified the assistant became frustrated with claimant delegating all physical tasks to him. Claimant testified he was ultimately fired by the hotel after the assistant alleged claimant threatened him. (Claimant's testimony)

At the time of evidentiary hearing, claimant was employed as a lawn chemical operator. He commutes to Fort Dodge, a distance of approximately 20 miles. Claimant works 5 days per week, averaging 35 to 40 hours per week, and earns $11.00 per hour. During periods of poor weather, claimant works fewer hours and claims unemployment. Claimant testified he works alone and interacts with perhaps 5 people per day; he testified avoidance of people helps him avoid suffering panic attacks. Claimant testified he would like to return to construction work in a supervisory capacity, provided he received the necessary mental health treatment to allow him to deal with such situations. Despite this desire, claimant testified he is not actively seeking employment and plans to remain in his current job for the foreseeable future. (Claimant's testimony)

Claimant testified he last received health insurance through the manufacturing company which employed him immediately after his employment with defendant-employer ended. Thereafter, he did not have health insurance coverage and ultimately was determined eligible for Title XIX/Medicaid. (Claimant's testimony)

Claimant testified he continues to suffer with back pain, primarily located around the T11 and T12 region. However, pain can radiate down the back into his hips and sporadically into his left leg. The radiation seems to relate to prolonged sitting or repetitive activities. Claimant testified he avoids use of prescription pain medication and opts to treat with ibuprofen. (Claimant's testimony)

Claimant testified he "desperately" wants additional psychiatric/psychological care. He currently takes medication ordered by his personal doctor, a medication designed for him to use when he suffers a panic attack. Claimant testified his current medication is the same as that recommended by Mr. Marvin, but denied by defendants. Claimant indicated the care he received from Mr. Marvin in 2010 and 2011 was quite helpful. Due to defendants' denial of care for an extended period, claimant would like the opportunity to select his own mental health providers. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is the proper rate of compensation.

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

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

The parties stipulate at the time of the work injury, claimant was single and entitled to one exemption. The parties, however, dispute the computation of claimant's gross weekly earnings. Claimant argues for a gross average weekly wage of $440.00, on the basis claimant worked 40 hours per week and earned $11.00 per hour. Defendants argue claimant's gross average weekly wage is $321.14, utilizing claimant's pay records.

Claimant credibly testified he worked approximately 60 hours per week; however, he was consistently paid for fewer hours than he worked. Claimant testified employees did not have the opportunity to clock-in and clock-out or otherwise provide notice of their hours worked, leaving the crew foreman with the sole ability to report employee hours. By claimant's testimony, the underpayment of hours to employees was so pervasive as to form the basis of a lawsuit. Claimant's testimony on these facts is unrebutted, except to the limited extent of claimant's pay check register. However, the register itself is unreliable, as it would be based upon the hours defendant-employer chose to pay, rather than upon how many hours claimant should have received pay for. Defendants provided no additional evidence to impeach claimant's testimony on the alleged underpayments nor to bolster the check register.

Given these facts, claimant's request to base his gross earnings on an hourly wage of $11.00 and a 40-hour work week is entirely reasonable and supported by the evidence. This conclusion is bolstered by defendant-insurance carrier's initial computation of claimant's gross average weekly wage of $440.00, precisely the amount requested by claimant. Defendants failed to provide sufficient evidence to warrant adoption of their proposed rate. It is therefore determined claimant's gross average weekly wage is $440.00 (40 hours per week x $11.00 per hour). Given the parties' stipulation claimant was single and entitled to two exemptions at the time of the work injury, it is determined claimant's proper rate of compensation is $298.03.

The next issue for determination is whether claimant is entitled to additional healing period benefits from January 16, 2010 through May 11, 2010.

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, Iowa App., 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.

Claimant was off work following the stipulated work injury and did not return to work until May 12, 2010. Claimant is therefore entitled to healing period benefits for this period.

By the hearing report, the parties stipulated defendants paid 16 weeks of healing period benefits at the rate of $298.03. This stipulation is verified by payment logs which reveal claimant received healing period benefits from January 16, 2010 through January 29, 2010 at the rate of $298.03. From January 30, 2010 through May 7, 2010,

defendants paid a total of $298.03 per week, but did so in the amount of $295.72 to claimant and $2.31 to "collection services."

This 16-week period does not include the entirety of the period to which claimant is entitled to healing period benefits. Specifically, claimant is also entitled to healing period benefits from May 8, 2010 through May 11, 2010. This 4-day period entitles claimant to an additional $170.18 in benefits (.571 week x $298.03 = $170.18). Although the parties did not stipulate to payment of this period on the hearing report, review of defendants' payment log at Exhibit I reveals claimant was issued a payment for the period in question, divided between two checks in the amounts of $168.98 and $1.32.

Claimant is entitled to healing period benefits for the period of January 16, 2010 through May 11, 2010, to be paid at the weekly rate of $298.03. This period spans 16.571 weeks. While the parties stipulated claimant was paid 16 weeks of healing period benefits at the rate of $298.03, review of the records reveals payment was made by defendants for the entire period. Therefore, claimant is not entitled to an additional award of healing period benefits.

The next issue for determination is whether claimant is entitled to temporary partial disability benefits from May 12, 2010 through August 23, 2010.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Claimant argues he is owed temporary partial disability benefits from the period of May 12, 2010 through August 23, 2010. Specifically, claimant argues he missed a total of 60 hours of work during this period. The parties stipulated claimant was paid for 58 hours of missed time in the amount of $638.00. This stipulation is consistent with defendants' payment log included as Exhibit I, which notes the benefits accrued during the period of May 12, 2010 through July 14, 2010.

The only evidence in the record regarding claimant's work hours is found in Exhibit 11. Exhibit 11 contains notation of many details of claimant's work assignments at defendant-employer. On certain dates, claimant highlighted the hours worked and references to physical therapy or light duty. The undersigned totaled the number of hours missed on these dates, assuming a typical 8-hour work day, and did not find claimant missed the 60 hours claimed.

While claimant may have missed 60 total hours of work, it is claimant who carries the burden of proving the hours were missed and the absence was causally related to the work injury. Claimant failed to carry that burden in this matter. The undersigned was provided no itemization of dates and hours missed, and the detailed report enclosed is not easily decipherable. The figures highlighted by claimant were presumed to reflect the necessary information, but these figures fail to sum to the total hours claimed by claimant. Claimant has failed to carry his burden of proving entitlement to additional temporary partial disability benefits.

The next issue for determination is the extent of claimant's industrial disability.

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)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant was 30 years of age on the date of evidentiary hearing. He did not complete high school, nor did he subsequently obtain a GED or diploma. Claimant has demonstrated the requisite intelligence to secure job-specific certifications, specifically related to use of chemicals, but claimant testified he had difficulty passing the tests required to obtain the certifications.

Claimant's work history consists of restaurant staff, cook, kitchen manager; construction; sales; manufacturing; maintenance; and certified lawn chemical operator. At the time claimant began work at defendant-employer in October 2009, he did so as a crew member and per claimant's testimony, a foreman-in-training. His duties were

physical in nature, with no cap on the amount of weight he was required to manipulate. Claimant credibly testified laborers wore tool belts which could weigh 60 to 70 pounds. He further testified laborers may need to lift items weighing 100 to 150 pounds. If one was unable to lift an item alone, he secured the help of coworkers.

On January 15, 2010, claimant sustained a work-related fall which resulted in compression fractures at T11 and T12. Following a course of treatment, claimant was released without restrictions by Dr. Palit on July 13, 2010. However, during this time claimant also developed mental health difficulties, including feelings of panic, anxiety, and hopelessness, as well as suffering with documented panic/anxiety attacks. Dr. Kakade assessed claimant with a generalized anxiety disorder and recommended prescription medications and psychotherapy. Mr. Marvin conducted the therapy sessions and opined on multiple occasions claimant suffered with anxiety issues related to the fall at work in January 2010. Mr. Marvin requested additional therapy sessions to assist claimant in utilizing cognitive-behavioral therapy to manage his symptoms. Despite this recommendation, in August 2010, defendants denied claimant further care of his mental health conditions. This denial persisted until February 2015, when a repeat evaluation was authorized.

The evidentiary record is devoid of any expert opinions which reach a contrary conclusion to that offered by Mr. Marvin. Mr. Marvin's opinion claimant suffered with mental health conditions as a result of the work injury is unrebutted and in fact, is supported by the opinions of IME physician, Dr. Manshadi who related claimant's anxiety/panic attacks and PTSD symptomatology to the work injury. Defendants have produced no arguments which would lead the undersigned to discount the opinions of Mr. Marvin; presumably defendants concede Mr. Marvin is a legitimate, credible mental health professional given his reauthorization to provide care in February 2015. Quite simply, defendants offered no competing expert opinion which would support a finding claimant's mental health complaints were not related to the work injury.

Accordingly, it is found claimant's work injury manifested in both a physical injury to his back and a mental health injury. Both resulted in permanent functional impairment. For claimant's back injury, both Dr. Palit and Dr. Manshadi based impairment ratings upon the extent of claimant's compression fractures. By this consistent methodology, Dr. Palit found claimant sustained a 19 percent whole person impairment and Dr. Manshadi found claimant sustained a 18 percent whole person impairment, entirely consistent opinions. In addition to the back impairment, Dr. Manshadi opined claimant sustained a 4 percent whole person impairment as a result of claimant's panic disorder, anxiety, and PTSD symptomatology. Dr. Manshadi's opinion is unrebutted in this regard.

Although Dr. Palit initially released claimant to return to work without restrictions, due to claimant's continued symptomatology, Dr. Palit eventually ordered an FCE. The FCE of December 2013 was found to be valid and revealed moderate limitations in claimant's standing tolerance, stair/ladder climbing, and walking tolerance. It also revealed significant deficits in lifting/carrying, pushing/pulling, and positional tasks,

specifically elevated work and forward bending. The therapist opined claimant capable of functioning within the medium physical demand category, with a maximum rare lift of 50 pounds. Dr. Palit reviewed the FCE and released claimant to return to work under the restrictions as set forth in the FCE, which had placed claimant in the medium work category. Dr. Manshadi also adopted the FCE, specifically recommending a 50-pound maximum lift on a rare basis, avoidance of work at heights and repetitive bending, stooping, or twisting of the back. As Dr. Manshadi's restrictions are consistent with the FCE, but more specific than the general restrictions noted by Dr. Palit, the undersigned adopts those restrictions recommended by Dr. Manshadi in consideration of the extent of claimant's industrial disability.

Claimant's permanent work restrictions would preclude claimant's return to his pre-injury position as a laborer at defendant-employer. This conclusion is consistent with claimant's unsuccessful attempt to continue in an employment relationship with defendant-employer. Although defendant-employer technically offered work, the work environment was not conducive to claimant's continued employment, particularly given defendants' unsupported denial of much needed mental health treatment.

Given claimant's initial release to return to work without physical restrictions and denial of further mental health treatment, claimant's attempt to return to gainful employment is commendable. Claimant initially returned to work light duty and then full duty at defendant-employer, albeit with difficulty. He subsequently obtained employment with multiple employers; however, manufacturing and construction labor work proved too physically demanding to maintain on extended bases. He also experienced social anxiety while attempting construction, sales, and hotel maintenance. Claimant's post-injury work history reveals multiple personality conflicts, potentially related to claimant's inability to properly manage his mental health conditions. In claimant's current employment as a lawn chemical operator, he works alone and limits his contact with others as a means to help avoid panic attacks.

Claimant's typical earnings throughout his adult working years generally ranged from $10.00 to $12.00 per hour. Defendant-employer paid claimant $11.00 per hour and then provided a raise to $11.50 per hour, although the raise was promised as $12.00 per hour. At one time post-injury, claimant earned $13.00 per hour in manufacturing, but was unable to physically tolerate such work. Claimant currently earns $11.00 per hour as a lawn chemical applicator. This hourly wage is the same as that earned at defendant-employer; however, this wage is also being earned approximately 5 years later, without any upward adjustment.

Claimant is a young worker. He lacks formal education, including a high school diploma or GED. He has been successful in obtaining certifications required of his employment, thus indicating he possesses the potential for retraining. As a result of the January 2010 fall, claimant sustained functional impairments to his back and mental health, both of which have also resulted in physical limitations or a need to self-accommodate by avoiding certain situations. These limitations have precluded claimant's return to his pre-injury position and have resulted in difficulty maintaining

employment, despite claimant's admirable effort to remain employed. It is possible that with further, necessary mental health treatment, claimant will be able to learn the coping strategies necessary to better manage his mental health conditions and to allow for a more successful repatriation to the work force.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 50 percent industrial disability as a result of the stipulated work-related injury of January 15, 2010. Such an award entitles claimant to 250 weeks of permanent partial disability benefits (50 percent x 500 weeks = 250 weeks), commencing on the stipulated date of December 13, 2013. Such benefits are to be paid at the weekly rate of $298.03.

The next issue for determination is whether claimant is entitled to reimbursement of an independent medical examination pursuant to Iowa Code section 85.39. Claimant seeks reimbursement for Dr. Manshadi's IME in the amount of $1,100.00. (Ex. 15) At the time of evidentiary hearing, defendants represented payment would be made to claimant for this expense, if reimbursement had not previously been issued. As defendants agree to reimburse claimant for Dr. Manshadi's IME expense, no additional consideration must be made with respect to this issue.

The next issue for determination is whether claimant is entitled to alternate care under Iowa Code section 85.27, in the form of ongoing psychiatric and/or psychological care.

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).

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

By this decision, the undersigned found claimant sustained a mental health injury causally related to the work injury of January 15, 2010. As a result of this determination, claimant is entitled to the medical care required to properly treat this condition. Defendants argue claimant has been authorized to return to Mr. Marvin for evaluation and thus, an award of alternate care is not warranted. Despite the pending authorization to return to Mr. Marvin, claimant requests the ability to control his own mental health treatment by selecting his own provider. Claimant argues this is warranted due to defendants' failure to provide timely care.

Dr. Palit recommended mental health evaluation as early as April 22, 2010. Claimant ultimately began care with licensed social worker, Mr. Marvin, and psychiatrist, Dr. Kakade in July 2010. The records reflect in August 2010, defendants denied claimant further mental health treatment in the form of medications or additional counseling. This step was taken despite Mr. Marvin's request for additional sessions and his opinion the mental health conditions were causally related to the fall at work in January 2010. Mr. Marvin even went so far as to describe ongoing mental health treatment as imperative in allowing claimant to return to full functioning and expressed belief defendants bore the responsibility for providing such care. The evidentiary record contains no contrary opinions; however, defendants persisted in the denial of mental health care. Defendants offered no mental health care until February 9, 2015, over 4 ½ years after arbitrarily denying such care.

Defendants failed to provide claimant with reasonable and necessary treatment of his mental health conditions which are causally related to the work injury of January 2010. Defendants offered no care and advised claimant's treating counselor that additional sessions were not authorized. Defendants did so despite the opinion of their own chosen mental health provider, who opined claimant required additional mental health treatment for conditions causally related to the work injury. On these facts, it is determined defendants failed to provide any form of mental health treatment in a timely manner after August 2010.

Accordingly, an award of alternate care is warranted. Defendants should not be permitted to deny mental health treatment for a period of over four years and then seek to maintain control over such care by authorizing a repeat evaluation shortly before the scheduled arbitration hearing. Claimant's application for alternate care is granted. Claimant may select his own mental health treatment providers at defendants' cost.

The final issue for determination is whether defendants are entitled to credit under Iowa Code section 85.34. Defendants' claim for credit is premised upon an alleged overpayment of healing period benefits during the period defendants paid benefits at a weekly rate of $298.03. By this decision, the undersigned determined the proper rate of compensation to be $298.03. Having so determined, there has been no overpayment of healing period benefits and thus, no basis for an award of credit to defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant healing period benefits at the weekly rate of two hundred ninety-eight and 03/100 dollars ($298.03) for the period of January 16, 2010 through May 11, 2010.

Defendants shall pay unto claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing on the stipulated date of December 13, 2013 at the weekly rate of two hundred ninety-eight and 03/100 dollars ($298.03).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall receive credit for benefits paid.

Claimant's application for alternate care is granted as set forth in the decision.

Defendants shall reimburse claimant for Dr. Manshadi's IME.

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

Costs are taxed to defendants pursuant to 876 IAC 4.33.

Signed and filed this 4th day of March, 2016.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.