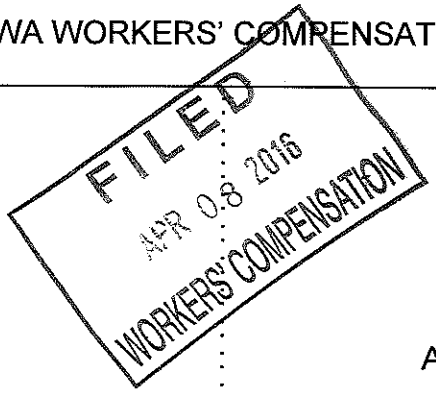
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JERRY ACKERMAN,

Claimant,

vs.

MEDIACOM, LLC,

Employer,

and

TRAVELERS INDEMNITY CO. OF CT.

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 5047160

ARBITRATION

DECISION

Head Note Nos.: 1803, 1808, 3200

STATEMENT OF THE CASE

Claimant, Jerry Ackerman, filed a petition in arbitration seeking workers' compensation benefits from Mediacom, LLC, employer, Travelers Indemnity Co. of Connecticut, insurance carrier, and the Second Injury Fund of Iowa, all as defendants, as a result of a stipulated injury sustained on June 22, 2011. This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on June 16, 2015, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 through 19, defendant-employer and insurance carrier's exhibits A through C, defendant Second Injury Fund of Iowa's exhibits AA through DD, and the testimony of the claimant. The parties submitted post-hearing briefs, the matter being fully submitted on July 3, 2015.

ISSUES

The parties submitted the following issues for determination:

1. Whether the stipulated injury is a cause of permanent disability to the right upper extremity;

2. The extent of claimant's permanent disability as to the employer and insurance carrier, including whether the injury is limited to the left upper extremity, bilateral arms, or resulted in permanent total disability;

3. Whether claimant is entitled to reimbursement for the costs of Dr. Bansal's independent medical evaluation pursuant to Iowa Code section 85.39 and, if so, in what amount;

4. Whether claimant is entitled to Second Injury Fund benefits and, if so, the amount of those benefits; and

5. Specific taxation of costs.

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 clear and consistent as compared to the evidentiary record and his deposition testimony. At the time of evidentiary hearing, claimant was personable, and his demeanor gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Debbie Hornbuckle, senior manager of human resources for defendant-employer, testified by way of deposition due to her inability to be present at evidentiary hearing. Ms. Hornbuckle's testimony was clear, professional, and consistent with the evidentiary record. The undersigned finds no reason to doubt Ms. Hornbuckle's veracity. Ms. Hornbuckle is found credible.

Claimant was 47 years of age at the time of hearing. He resides in Milo, Iowa with his wife and their minor children. (Claimant's testimony; Exhibit 12, page 178; Ex. A, p. 1) Claimant attended high school through the 10th grade before dropping out; he subsequently earned his GED. Claimant is right-hand dominant. (Claimant's testimony; Ex. 12, p. 179; Ex. A, p. 1)

Claimant worked part time performing assembly of auto parts and minor repairs on vehicles prior to joining the United States Army in 1986. (Claimant's testimony; Ex. 12, p. 180) Claimant then served in the Army infantry from May 1986 to April 1987. (Claimant's testimony; Ex. 9, p. 128) After his year of military service, claimant worked as an automobile dismantler, convenience store assistant manager, shop foreman and mechanic at an auto parts store, brake installer, home framer, concrete laborer, glazier, and airport security. (Claimant's testimony; Ex. 12, pp. 180-182)

Claimant joined and served in the Iowa National Guard from October 2003 to October 2004, including on an active duty deployment to Kosovo. (Ex. 9, p. 128; Ex. 12, p. 182; Ex. A, p. 2) While in Kosovo, claimant sustained a left ankle injury. Medical records from the military clinic dated March 23, 2004 note claimant rolled his right ankle while on patrol and was assessed with a left ankle sprain. (Ex. 1, p. 1) Claimant was treated conservatively and on follow up, his diagnosis was changed to left dorsiflexor tendonitis. (Ex. 1, p. 4) Further conservative treatment followed, including use of a splint, crutches, ankle brace, medications, and reduced activities. (Ex. 1, pp. 5-11)

Physical therapy was ordered for the left ankle, which claimant began while still deployed. When claimant's deployment ended, he was authorized for additional physical therapy stateside. (Claimant's testimony; Ex. 1, pp. 11, 14) On September 15, 2004, claimant was discharged from physical therapy. Physical therapy records indicate claimant reporting feeling "great," with no pain for a week or more. The therapist discharged claimant from therapy after meeting his goals, with no further therapy indicated. (Ex. AA, p. 1) Claimant testified physical therapy helped significantly at the time. He reported continuing to suffer with aches and pains intermittently, but no "drastic" symptoms. (Claimant's testimony)

Following his service, claimant worked as night-shift campus security at Drake University from 2004 to 2006. One of his duties during this period was to walk the campus to ensure buildings were properly secured. (Claimant's testimony; Ex. 12, p. 182; Ex. A, p. 2)

In June 2006, claimant was hired by defendant-employer and began work as an installer of cable, internet, and phone services. Claimant subsequently worked as an installer tech, service tech, and system tech. As a system tech, claimant no longer worked on individual homes but on hundreds of homes at a time. Claimant earned approximately $16.00 per hour and worked significant amounts of overtime. Claimant testified he loved his job and planned to continue working as a system tech until he retired. Each of his positions at defendant-employer required claimant to climb poles and ladders; as a system tech, claimant estimated he spent 80 percent of his time on his feet. (Claimant's testimony; Ex. 12, p. 182; Ex. 14, pp. 198-199; Ex. A, pp. 2-3)

While at work on June 22, 2011, claimant reached down and attempted to lift an object from the ground when he felt a pop in his left elbow. Claimant telephoned his supervisor and advised him of the event. (Claimant's testimony) Defendant-employer referred claimant to Iowa Methodist Occupational Health (Iowa Methodist), where he was evaluated by Michael Knipp, M.D. Following examination, Dr. Knipp assessed a left elbow strain/sprain and left hand paresthesias. He imposed work restrictions and recommended use of Naprosyn and Tylenol. (Ex. 2, p. 15)

On June 29, 2011, Dr. Knipp's colleague, Anandeep Kumar, M.D., recommended claimant undergo an EMG of the left upper extremity. (Ex. 3, p. 17) Bill Koenig, M.D. performed an EMG on July 1, 2011 and opined it revealed active left cubital tunnel

syndrome. (Ex. 8, p. 115) On July 6, 2011, claimant returned to Dr. Knipp, who opined claimant's EMG showed active left cubital tunnel syndrome. Out of fear of a traumatic ulnar neuropathy, Dr. Knipp ordered a left elbow MRI. (Ex. 2, p. 16)

Defendant-employer and insurance carrier arranged for claimant to be evaluated on August 23, 2011 at Des Moines Orthopedic Surgeons by Delwin Quenzer, M.D. Dr. Quenzer opined claimant's EMG revealed significant left ulnar neuropathy at the elbow and recommended surgery. Prior to proceeding with surgery, however, he recommended a left elbow MRI. (Ex. 4, pp. 18-19) Claimant underwent left elbow MRI on September 1, 2011. (Ex. 8, p. 118)

On September 6, 2011, Dr. Quenzer reviewed claimant's MRI and opined he observed findings consistent with a partial tear of the left biceps at the elbow. He recommended immediate surgical intervention on the cubital tunnel, but recommended waiting until after the cubital tunnel surgery to determine if the biceps tear also required surgical intervention. (Ex. 4, pp. 22-23)

On October 7, 2011, Dr. Quenzer performed left endoscopic cubital tunnel release. He issued post-operative diagnoses of left cubital tunnel syndrome and a partial rupture of the left biceps at the elbow. (Ex. 4, pp. 24-25) Dr. Quenzer released claimant to return to work under restrictions on October 11, 2011 and to full duty on November 1, 2011. (Ex. 4, pp. 26-27) Claimant testified he then returned to work at defendant-employer.

Dr. Quenzer placed claimant at maximum medical improvement (MMI) on November 17, 2011. (Ex. 4, p. 29) Dr. Quenzer opined claimant demonstrated full range of motion, normal sensation, and no focal weakness, thus warranting no ratable permanent impairment of the left upper extremity. He further opined no permanent restrictions were necessary. (Ex. 4, pp. 30, 33) However, Dr. Quenzer advised claimant to return one year following surgery, should he continue to suffer with elbow symptoms, at which time further surgery might be contemplated. (Ex. 4, p. 29)

On March 7, 2012, claimant returned to Dr. Quenzer with new left upper extremity complaints. On examination, Dr. Quenzer noted the left ulnar nerve was unstable at the elbow. Accordingly, he recommended surgical intervention. (Ex. 4, p. 34)

On March 22, 2012, claimant underwent repeat surgery with Dr. Quenzer, consisting of a left ulnar neuroplasty at the elbow with subcutaneous transposition. (Ex. 4, p. 37) Following surgery, Dr. Quenzer released claimant to light duty work in April 2012. (Ex. 4, p. 43) He subsequently ordered a course of physical therapy. (Ex. 4, p. 46) On July 10, 2012, Dr. Quenzer released claimant to full duty work and opined claimant did not require permanent restrictions. (Ex. 4, pp. 46, 50)

Dr. Quenzer placed claimant at MMI on September 27, 2012 and released him from care. Dr. Quenzer opined claimant could resume full duty work, without permanent

restrictions. (Ex. 4, p. 51) He subsequently opined claimant sustained no ratable permanent impairment due to normal sensation and lack of focal motor weakness. (Ex. 4, p. 54) Claimant testified he resumed full duty work at defendant-employer.

On January 31, 2013, claimant presented to Mercy Indianola Family Medicine. He complained of left elbow pain, for which he desired treatment until he was able to be evaluated by a specialist. Claimant explained his symptoms flared after working all night due to a storm. (Ex. 5, p. 55) He was prescribed prednisone and Tramadol. (Ex. 5, p. 57)

With defendant-employer and insurance carrier's authorization, on February 6, 2013, claimant presented to Central Iowa Orthopaedics for evaluation with Scott Neff, D.O. Claimant reported left arm symptoms worse than prior to either of his preceding surgeries. (Ex. 6, p. 58) Dr. Neff opined examination showed significant symptoms of ulnar nerve dysfunction and accordingly, recommended a repeat EMG. (Ex. 6, p. 59) Dr. Koenig performed repeat left upper extremity EMG testing on February 26, 2013. Dr. Koenig opined the EMG revealed very mild left carpal tunnel syndrome, mild left distal ulnar tunnel syndrome at or near the Guyon's canal, and active left cubital tunnel syndrome. (Ex. 8, p. 119)

On March 4, 2013, Dr. Neff reviewed claimant's EMG and opined it revealed active cubital tunnel syndrome and mild entrapment of the ulnar nerve at the Guyon's canal in the left wrist. He opined the condition could be treated surgically, but claimant was hesitant to undergo another procedure. Dr. Neff indicated he would not be averse to claimant receiving a second opinion. (Ex. 6, p. 60)

Claimant ultimately agreed to undergo surgery, which Dr. Neff explained would consist of a left ulnar nerve revision and decompression, with careful exploration of the nerve, and a plan to reroute the nerve anteriorly and cover the nerve with nerve protection sleeves. (Ex. 6, p. 61)

On May 10, 2013, Dr. Neff performed a revision left carpal tunnel decompression with excision of extensive scar tissue and application of AxoGuards, and ulnar nerve decompression of the Guyon's canal. (Ex. 6, p. 62) Following surgery, Dr. Neff removed claimant from work and prescribed Vicodin. (Ex. 6, pp. 64, 67)

Dr. Neff released claimant to return to work on light duty desk work on August 26, 2013, with required use of an elbow sleeve. (Ex. 6, pp. 70-71) Defendant-employer was unable to accommodate this restriction. Due to exhaustion of FMLA leave, defendant-employer placed claimant on a leave of absence. (Ex. 16, p. 226)

On September 25, 2013, claimant returned to Dr. Neff. Dr. Neff indicated he desired to wait an additional six months before placing claimant at MMI. He prescribed hydrocodone for claimant to use on an as-needed basis. Dr. Neff opined claimant could return to work under permanent work restrictions of lifting 5 pounds or less with the left arm and avoidance of intensive pushing, pulling, or vibration. (Ex. 6, pp. 73-74) On

October 7, 2013, utilizing the information from the September 25, 2013 appointment, Dr. Neff issued a work release allowing claimant to work under a restriction of lifting 10 pounds or less. (Ex. 6, p. 75)

Following receipt of Dr. Neff's restrictions, claimant's attorney contacted defendant-employer and requested accommodation. (Ex. 16, pp. 228-229)

Defendant-employer's senior manager of human resources, Debbie Hornbuckle, indicated defendant-employer was unable to accommodate Dr. Neff's restrictions in claimant's existing system tech position. She encouraged claimant to consider other positions at defendant-employer and identified three positions which she believed fell within the restrictions: internet tech support representative, dispatch representative, and HFC NOC. Ms. Hornbuckle encouraged claimant to review these positions and apply if he believed himself qualified. (Ex. C, Depo. Tr. pp. 7-8; Ex. 16, p. 230) Ms. Hornbuckle testified the internet tech support position and dispatch representative position both required phone and computer usage for troubleshooting. (Ex. C, Depo. Tr. pp. 24, 28) The HFC NOC position involved telephoning customers to advise of outages and/or performance of proactive analysis designed to predict potential line problems due to the history of outages. (Ex. C, Depo. Tr. pp. 29-30)

Claimant rejected the three positions suggested by Ms. Hornbuckle, as he believed the opportunities were not economically feasible due to a need to commute to Des Moines. Claimant inquired if any positions were available to him closer to his residence. (Ex. 16, p. 232) Ms. Hornbuckle testified she telephoned claimant and suggested he review the available positions posted on defendant-employer's website. (Ex. C, Depo. Tr. p. 9)

Ms. Hornbuckle testified their collective effort to locate claimant alternative employment was then put on hold due to claimant's development of right arm symptoms, which required medical evaluation. (Ex. C, Depo. Tr. pp. 10-12)

Claimant returned to Dr. Neff on November 12, 2013 with complaints of pain, numbness and tingling in the ulnar nerve distribution of the right arm. Dr. Neff opined it likely that claimant developed right cubital tunnel syndrome as a result of his work activities and protection of the left arm. Accordingly, Dr. Neff recommended an EMG of the right upper extremity. (Ex. 6, p. 77) Dr. Koenig performed a right upper extremity EMG on December 5, 2013 and opined it revealed active right cubital tunnel syndrome. (Ex. 8, p. 122)

Claimant returned to Dr. Neff on December 10, 2013. Dr. Neff opined the EMG revealed active right cubital tunnel syndrome and he recommended surgical decompression. (Ex. 6, pp. 80-81)

Claimant underwent right upper extremity surgery with Dr. Neff on December 27, 2013, consisting of right cubital tunnel decompression with epicondylectomy, transposition of the nerve, and application of a NervePace nerve protection sleeve. (Ex.

6, pp. 83-84) Following surgery, Dr. Neff removed claimant from work and prescribed hydrocodone. (Ex. 6, pp. 86-88) On February 5, 2014, Dr. Neff opined claimant could return to work under restrictions of no line work, a maximum 5 pound lift at or below shoulder level, and no typing. (Ex. 6, p. 93) Claimant was not returned to work at defendant-employer under these restrictions. (Claimant's testimony)

Due to persistent numbness, on March 19, 2014, Dr. Neff recommended a repeat EMG. (Ex. 6, p. 96) Dr. Koenig performed repeat right upper extremity EMG testing on April 10, 2014. Dr. Koenig opined the study revealed very mild right cubital tunnel syndrome. (Ex. 8, p. 125)

Claimant returned to Dr. Neff on April 15, 2014. Dr. Neff opined claimant's EMG revealed very mild cubital tunnel, with significant improvement over the December 5, 2013 EMG study. (Ex. 6, p. 100) He noted claimant remained off work and expressed some question with respect to claimant's work abilities. Dr. Neff opined claimant was not capable of returning to overhead line work, carrying overhead ladders, or doing overhead wrenching or like activities. (Ex. 6, p. 101)

On June 10, 2014, claimant returned to Dr. Neff, who opined claimant was nearing MMI, despite some continued symptoms. Dr. Neff opined an evaluation of claimant's permanent impairment would require evaluation of claimant's grip strength and range of motion, as well as EMG documentation of ulnar nerve function. (Ex. 6, p. 104) Dr. Neff released claimant to work under restrictions of lifting 10 pounds or less with the bilateral arms. (Ex. 6, p. 105)

In June 2014, Ms. Hornbuckle testified she again began coordinating with claimant with respect to job opportunities at defendant-employer. They agreed claimant was unable to return to his pre-injury job, and claimant indicated he would look into jobs at defendant-employer that he felt capable of performing. (Ex. C, Depo. Tr. pp. 10-12) Ms. Hornbuckle testified claimant submitted applications for an engineering position and a safety supervisor position. However, the engineering position required additional education, and the safety coordinator position was beyond claimant's physical abilities. (Ex. C, Depo. Tr. pp. 12-13) Claimant testified he was unable to afford tuition to take the classes required of the engineering position. (Claimant's testimony)

As he had not returned to work, claimant submitted a claim for unemployment benefits. On July 10, 2014, claimant's claim for such benefits was denied. The decision found claimant was not eligible for unemployment benefits, as he was under a leave of absence and thus, voluntarily unemployed and not available for work. (Ex. BB, p. 2)

On August 5, 2014, claimant presented to Family Medicine—Ingersoll and was evaluated by Janae Brown, ARNP. Ms. Brown noted claimant presented to discuss a 2004 injury to his left ankle because the VA had denied him further treatment, due to a lack of evidence his complaints were service related. Claimant expressed complaints of left lateral ankle pain, trouble standing for long periods, swelling of the ankle, and interference with work and play with his children. Claimant indicated his attorney

desired the opinion of claimant's primary care provider on what treatment may be warranted by his left ankle complaints. Following evaluation, Ms. Brown assessed a left ankle sprain. She offered treatment recommendations of left ankle x-rays, physical therapy, and an orthopedic referral. She also opined claimant should pursue such care through the VA, as his complaints were service related. (Ex. 7, p. 114)

On August 6, 2014, claimant returned to Dr. Neff, who opined claimant's EMG revealed no evidence of right cubital tunnel syndrome or carpal tunnel syndrome. On examination, Dr. Neff evaluated claimant's range of motion, and opined claimant demonstrated good sensation of the right hand, with no numbness in the ulnar nerve distribution. Dr. Neff noted claimant complained of tenderness over the incision area and with resting of the elbow on a hard surface. Following examination, Dr. Neff opined claimant achieved MMI six months post-surgery. Dr. Neff opined claimant sustained no ratable impairment to the right upper extremity due to full range of motion of the elbow, lack of numbness and tingling, and EMG findings. (Ex. 6, pp. 106-107)

In September 2014, Ms. Hornbuckle offered claimant a position as a direct sales representative. Ms. Hornbuckle testified she believed claimant met the physical requirements to perform the job. (Ex. 16, pp. 233-235; Ex. C, Depo. Tr. pp. 14, 17) A direct sales representative is tasked with door-to-door sales within a community. (Ex. B) Ms. Hornbuckle represented the direct sales representatives are not required to perform installation tasks. (Ex. C, Depo. Tr. pp. 15-16) The base salary of this position is $17,680.00, with increases for tenure with defendant-employer and the potential for commissions. (Ex. C, Depo. Tr. p. 20) Ms. Hornbuckle testified the average total earnings for direct sales representatives is in the $40,000.00 to $50,000.00 range. (Ex. C, Depo. Tr. p. 22)

Claimant declined the position as a direct sales representative with defendant-employer. (Ex. 16, pp. 233-235; Ex. C, Depo. Tr. pp. 17-18) Claimant testified the job was not a good fit for him and was better suited for a young person. Claimant explained the walking required would have aggravated his ankle, as well as his elbows from swinging his arms and knocking on doors. Claimant testified he had heard of such employees working long hours attempting to make quota and performing installations which required the employee to carry equipment and move furniture. He also felt his lack of sales experience would be problematic. (Claimant's testimony)

After claimant declined the position, he informed Ms. Hornbuckle he would review the additional openings at defendant-employer. On September 24, 2014, claimant informed Ms. Hornbuckle that he did not observe any positions for which he believed he qualified. As a result of the unsuccessful attempts to return claimant to work, in October 2014, defendant-employer notified claimant he would no longer be considered an employee. (Ex. C, Depo. Tr. pp. 17-18)

Dr. Neff authored a letter to defendant-insurance carrier dated September 30, 2014. He opined in order for him to provide an accurate impairment rating for the left

upper extremity, he required an up-to-date EMG of the left upper extremity. (Ex. 6, p. 108)

Dr. Koenig performed a repeat left upper extremity EMG on October 21, 2014. Dr. Koenig observed no evidence of nerve root compression, normal left median and ulnar sensory distal latencies, and active cubital tunnel syndrome essentially unchanged from the February 26, 2013 study. (Ex. 6, p. 110) Following review of the left upper extremity EMG, Dr. Neff opined claimant sustained a permanent impairment of 5 percent left upper extremity secondary to persistent cubital tunnel syndrome. (Ex. 6, p. 109)

Claimant submitted an application for Social Security disability benefits. On October 13, 2014, the Social Security Administration determined claimant did not qualify for Social Security disability benefits, as claimant was not disabled under the applicable rules. Claimant applied for Social Security disability benefits on the bases of conditions of his bilateral arms, chronic pain, tendinitis of the left ankle, and problems with lifting and manipulating objects, sleeping, and gripping. The Social Security Administration determined claimant's conditions were not severe enough so as to prevent claimant from working, and claimant was capable of adjusting to other work. (Ex. CC, p. 3) Claimant applied for reconsideration of this decision. On December 1, 2014, the Social Security Administration issued a decision finding the prior determination denying claimant's claim was proper. (Ex. CC, p. 7)

Claimant applied for disability benefits through the VA in connection with his left ankle tendonitis. The VA noted claimant's claim for such benefits had been previously denied on December 22, 2006, October 23, 2012, and December 3, 2012. By a decision dated October 20, 2014, it was determined claimant sustained a 10 percent disability as a result of the left ankle tendonitis due to painful motion of the ankle. (Ex. 9, pp. 128-130)

At the arranging of claimant's attorney, on November 21, 2014, claimant presented to board-certified occupational medicine physician, Sunil Bansal, M.D. for an independent medical evaluation (IME). Dr. Bansal issued a report of his findings and opinions dated April 13, 2015. As part of his IME, Dr. Bansal performed a records review and interview of claimant. (Ex. 10, pp. 132-144)

Dr. Bansal's report contains a narrative regarding claimant's treatment and symptoms over time. Dr. Bansal noted claimant sustained a left ankle injury in 2004; claimant reported the left ankle gradually worsened over time. Claimant indicated his left ankle pain averaged a 5 on a 10-point scale, but could reach a level 9. (Ex. 10, pp. 145-146) Claimant also complained of left elbow pain, radiating down to the third, fourth, and fifth digits of the left hand, and up to the shoulder and neck region. Additionally, claimant reported suffering with intermittent numbness and tingling of the left forearm and hand, as well as complete numbness at the surgical scar site. Claimant reported left elbow pain ranging from a level 3 to a level 9 and left hand pain which could reach a level 5. He also complained of occasionally dropping items held in the left

hand due to numbness. (Ex. 10, pp. 145-146) Additionally, claimant complained of numbness and tingling of the right hand with use of the arm or prolonged flexion of the elbow. Claimant reported his right arm pain ranged from a level 2 to a level 6. (Ex. 10, pp. 145-146) Claimant reported his sleep is interrupted due to his arm complaints. (Ex. 10, p. 146)

Claimant informed Dr. Bansal he felt able to lift 30 pounds with the left arm alone, but he would be unable to sustain that lift for long or carry for a distance. He also did not believe he would be able to lift that amount of weight repetitively. Claimant indicated lifting over shoulder level was painful for him, and overhead work takes longer than it had pre-injury due to his need to lower his arms to rest. Claimant expressed belief he could lift 5 pounds overhead. (Ex. 10, p. 146)

Dr. Bansal noted claimant had been assigned permanent restrictions of no lifting greater than 5 pounds with the left arm; no pushing, pulling, or use of vibratory tools with the left arm; and no lifting over 10 pounds with the bilateral hands. (Ex. 10, p. 147)

Following records review, interview, and physical examination, Dr. Bansal offered his opinions on permanent impairment and need for permanent work restrictions as a result of the three conditions. Dr. Bansal opined claimant achieved MMI and did not require further treatment for the left elbow. On the basis of sensory and motor deficits, Dr. Bansal opined claimant sustained a permanent impairment of 11 percent left upper extremity or 7 percent whole person. He recommended permanent restrictions of no lifting greater than 30 pounds occasionally or 15 pounds frequently with the left arm, no lifting over 5 pounds over shoulder level with the left arm, and avoidance of tasks requiring prolonged flexion of the left arm. (Ex. 10, pp. 151-152) Dr. Bansal opined claimant sustained a permanent impairment of 5 percent upper extremity or 3 percent whole person as a result of sensory and motor deficits of the right upper extremity. He recommended permanent restrictions of no lifting greater than 30 pounds occasionally or 15 pounds frequently with the right hand and avoidance of prolonged flexion of the right arm. Due to decreased range of motion of the ankle, Dr. Bansal opined claimant sustained a permanent impairment of 7 percent lower extremity as a result of left dorsiflexor tendonitis. (Ex. 10, p. 154)

Claimant last worked at defendant-employer on May 9, 2013, prior to undergoing left elbow surgery with Dr. Neff. In addition to his applications at defendant-employer, claimant applied for work as a driver at an auto parts store and submitted an application for all positions at his local Wal-Mart. He never received an offer of employment. (Claimant's testimony)

Claimant testified he then began to work with the VA to receive retraining. He is currently enrolled in a full time human services program, for which the VA pays. In order to qualify for VA assistance, claimant worked with a VA counselor and completed testing to determine his aptitudes and abilities. The counselor then provided him with a list of courses of study for which the VA would pay, including human services. Claimant is to complete the coursework necessary to obtain his associate's degree through

Des Moines Area Community College; the remainder of his bachelor's degree will then be completed at Grandview University. Claimant testified the VA provided him with a computer to use, outfitted with a program which types his spoken words. Claimant explained he is a poor typist. While claimant remains in school and maintains a satisfactory grade point average, the VA provides a subsistence allowance of $1,062.00 per month. He also receives $255.00 per month in VA disability benefits. (Claimant's testimony)

Claimant continues to complain of left arm symptoms, which he believes are no different than on the date of his injury. Claimant related constant left arm pain at a level 7, reaching level 9 by the end of a day. He also reported he drops items held in his left hand. Claimant reports approximately 40 percent improvement in his right arm symptoms following surgery and treatment. Claimant testified he develops pain and numbness with bending and flexion of the elbow. After only a few minutes of bending at the elbow, claimant's right arm pain reaches a level 5 and will remain at that level throughout the day. Claimant testified if he engages in a lot of note taking at school, his arm can reach a level 7 and will remain aggravated for a couple of days. (Claimant's testimony)

Claimant's activities of daily living are impacted by his bilateral arm symptoms. Claimant testified he is woken by pain every two to three hours. When he suffers with arm symptoms, he sits in his recliner with pillows under his arms. Despite ongoing symptoms, claimant is not undergoing current medical care and ceased taking over-the-counter medications due to stomach upset. (Claimant's testimony)

Claimant expressed belief Dr. Bansal's report is likely more accurate than Dr. Neff's records with respect to his physical abilities. Claimant testified he used the restrictions of Dr. Neff in his prior work search, as those were the only restrictions he had at the time. By the time he received Dr. Bansal's report, he had already enrolled in college through the VA. In the event he was required to immediately apply for a job, claimant testified he would attempt to use the restrictions recommended by Dr. Bansal, as opposed to those recommended by Dr. Neff, to locate work and determine if he was able of sustaining employment at that level. However, claimant acknowledged he had not attempted to lift an item weighing 30 pounds since his latest surgeries, and his elbows flare with lifting items heavier than a gallon on milk. (Claimant's testimony)

Claimant testified over time, his left ankle symptoms began to worsen and resulted in swelling of the ankle at the end of a work day. Claimant testified he would elevate the ankle and apply ice; he was then able to return to work the following day at defendant-employer. Claimant testified he continues to experience swelling of the ankle with long periods of walking, as well as with shooting pains up his left leg. He reported the ability to walk for up to two hours while grocery shopping, albeit with use of a cart for support. Claimant also testified to some difficulty climbing stairs at his college campus. Claimant testified he intended to schedule medical evaluation of his ankle at the VA during his upcoming break between college courses.

CONCLUSIONS OF LAW

The first issue for determination is whether the stipulated work injury of June 22, 2011 is a cause of permanent disability to the right upper extremity. The parties stipulated the injury was a cause of permanent disability to the left upper extremity.

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).

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Defendant-employer and insurance carrier accepted liability for a sequela injury to claimant's right upper extremity, which required surgical intervention on December 27, 2013. Claimant credibly testified he continues to suffer with pain and numbness of the right arm with bending and flexing of the elbow. With a few minutes of bending, claimant testified his pain can reach a level 5 on a 10-point scale and will then remain symptomatic the remainder of the day. Claimant is right-hand dominant, and his pain can flare to a level 7 with extensive note-taking during his college classes.

Two physicians have offered opinions as to whether, and to what extent, claimant sustained permanent impairment to his right upper extremity as a result of the June 22, 2011 injury. These two physicians also offered opinions regarding the necessity of permanent work restrictions relative to the right upper extremity injury. Dr. Neff opined claimant sustained no ratable impairment due to full range of motion of the elbow, lack of numbness and tingling, and negative EMG findings. Dr. Neff released claimant to work under restrictions of a 10-pound maximum lift with the bilateral arms. Dr. Bansal

opined claimant sustained a permanent impairment of 5 percent right upper extremity as a result of sensory and motor deficits. Dr. Bansal recommended permanent restrictions of no lifting greater than 30 pounds occasionally or 15 pounds frequently with the right hand and avoidance of prolonged flexion of the right arm.

Although Dr. Neff opined claimant sustained no ratable permanent impairment, a lack of ratable permanent impairment is not synonymous with a lack of permanent disability. Assuming *arguendo* that Dr. Neff's rating of permanent impairment is accurate, the remainder of the evidence clearly supports a determination claimant sustained permanent disability of the right upper extremity. Claimant credibly testified to continued symptoms and limitations with respect to the right arm, limitations which are supported by the permanent restrictions recommended by Drs. Neff and Bansal. As claimant laborers under permanent restrictions on his right arm, it is determined claimant has proven the work injury of June 22, 2011 is a cause of permanent disability to his right arm.

The next issue for determination is the extent of claimant's permanent disability as to the employer and insurance carrier.

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 extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under section 85.34(2)(s); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

The parties stipulated the work injury of June 22, 2011 was a cause of permanent disability to the left upper extremity. By this decision, the undersigned determined claimant proved the work injury also resulted in permanent disability to the right upper extremity. As claimant has established injuries to the bilateral arms as a result of the work injury, claimant is to be compensated pursuant to Iowa Code section 85.34(2)(s). By section 85.34(2)(s), the loss of both arms shall be compensated on the basis of 500 weeks, unless claimant is permanently and totally disabled.

When section 85.34(2)(s) is involved, this agency must first determine whether the two simultaneous injuries caused a total loss of earning capacity. If the

simultaneous injuries caused a total loss of earning capacity, then permanent total disability benefits are awarded. However, if the loss of earning capacity is less than total, then the extent of permanent disability is measured functionally as a percentage of loss of use for each injured extremity, after being converted to a percentage of the whole person and combined. Riley v. Eaton Corp., File Nos. 5037054, 5037055 (Appeal April 25, 2013).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

As a result of the stipulated work injury of June 22, 2011, claimant sustained bilateral injuries to his upper extremities. Claimant's work history has varied, but has consistently qualified as physically demanding work. Since the work injury, claimant has not returned to work in any capacity.

Although claimant has not successfully returned to the workforce, claimant has ceased his work search as he pursues retraining through a VA college assistance program. Additionally, claimant's unsuccessful work search was performed with claimant limiting himself to employment opportunities within Dr. Neff's permanent restrictions. While Dr. Neff served as claimant's treating physician and surgeon, the undersigned has questions with respect to the continued accuracy of Dr. Neff's restrictions. I doubt Dr. Neff's restrictions because Dr. Bansal's restrictions comport more closely with claimant's stated abilities than do Dr. Neff's. Claimant himself testified he would utilize Dr. Bansal's restrictions in a work search. As claimant has not actively sought work within these significantly less restrictive restrictions, the undersigned finds claimant has failed to prove he is permanently and totally disabled as a result of the work injury of June 22, 2011.

As claimant has failed to prove he is permanently and totally disabled as a result of the work injury of June 22, 2011, his permanent disability is determined functionally in accordance with section 85.34(2)(s).

As a result of the work injury, claimant received permanent impairment ratings of 5 percent left upper extremity from Dr. Neff, and 11 percent left upper extremity and 5 percent right upper extremity from Dr. Bansal. While Dr. Neff served as claimant's treating physician, with the opportunity to observe claimant on multiple occasions over

time, the undersigned adopts the opinions of Dr. Bansal with respect to the extent of claimant's permanent impairment. I adopt the permanent impairment ratings of Dr. Bansal, as Dr. Neff's ratings do not adequately consider the functional loss resultant to claimant from imposition of bilateral work restrictions. A sole 5 percent left upper extremity rating simply does not comport with the significant work restrictions imposed by Dr. Neff or even with the less restrictive restrictions recommended by Dr. Bansal.

It is determined claimant sustained a left upper extremity impairment of 11 percent and a right upper extremity impairment of 5 percent. When converted and combined, these ratings are equivalent to a 10 percent whole person rating. Such a finding entitles claimant to 50 weeks of permanent partial disability benefits (10 percent x 500 weeks = 50 weeks) as a result of the stipulated work-related injury of June 22, 2011. Benefits shall commence on the stipulated date of June 11, 2014. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were $792.00, and claimant was married and entitled to 5 exemptions. The proper rate of compensation is therefore, $543.86. Defendant-employer and defendant-insurance carrier are entitled to credit for 20 weeks of permanent partial disability benefits previously paid.

The next issue for determination is whether claimant is entitled to reimbursement for the costs of Dr. Bansal's independent medical evaluation pursuant to Iowa Code section 85.39 and, if so, in what amount.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In crafting his 25-page IME report, Dr. Bansal performed a records review, interview and examination of claimant with respect to injurious conditions of three body parts: the left upper extremity, right upper extremity, and left ankle. Dr. Bansal charged $3,495.00 for the IME. Claimant requests reimbursement for the full amount of this IME, contending the entire IME cost was reasonable. Defendant-employer and defendant-insurance carrier agree to pay one-half of the IME expense, but believe the full cost of $3,495.00 is not reasonably assessed to them, given a portion of the IME dealt with claimant's alleged first qualifying loss in 2004.

Dr. Bansal's IME dealt with injurious conditions of three body parts, thus rendering a higher IME expense reasonable. However, it is not reasonable to require defendant-employer and defendant-insurance carrier to bear the cost of claimant's case preparation expenses for the claim against the Second Injury Fund. Therefore, defendant-employer and defendant-insurance carrier are taxed with two-thirds of the cost of Dr. Bansal's IME, as two of the three injurious conditions addressed by Dr. Bansal were the subject of claim against the employer. It is therefore reasonable for defendant-employer and defendant-insurance carrier to reimburse claimant $2,330.00 of Dr. Bansal's IME fee.

The next issue for determination is whether claimant is entitled to Second Injury Fund benefits and, if so, the amount of those benefits.

Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978);Iowa Practice, Workers' Compensation, Lawyer and Higgs, section 17-1 (2006).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1979).

In order to qualify for benefits from the Fund, claimant first must establish a first qualifying loss. Claimant argues the 2004 injury to his left ankle qualifies as such a loss, relying upon claimant's testimony, the VA disability rating, and the impairment rating assigned by Dr. Bansal. The Fund argues the 2004 injury is not a first qualifying loss, as claimant did not seek medical treatment after September 2004, does not have left ankle restrictions, and the injury did not impact his employment.

Review of the evidence clearly demonstrates claimant sustained a left ankle injury in March 2004, diagnosed as left ankle tendonitis. The record also reveals claimant received conservative treatment and was discharged from care in September 2004. The evidentiary record is devoid of any additional medical treatment for the ankle. While claimant did present to Ms. Brown on August 5, 2014, he did so in connection with a claim against the VA, and the appointment resulted in no active

treatment, as claimant did not follow through with the potential treatment recommendations made by Ms. Brown.

Following the 2004 injury, claimant returned to civilian employment as a security officer and then for defendant-employer. His work as a security officer required extensive walking, which claimant was capable of performing. During claimant's employment with defendant-employer, he was required to climb poles and ladders. While working as a system tech, claimant testified he spent 80 percent of his work day on his feet. Claimant testified his ankle pain gradually worsened, and he resorted to self-treating with ice and elevation at the end of work days; however, claimant was able to work each day as a system tech, a position he testified he loved and intended to perform until his retirement. The record fails to show the left ankle condition impacted claimant's employment between 2004 and his work injury in 2011.

Claimant also relies upon the disability determination authored by the VA and the IME opinion of Dr. Bansal. The VA determined claimant's left ankle tendonitis qualified claimant for 10 percent disability due to painful motion of the ankle. It is unclear how the VA arrived at this disability percentage and accordingly, the undersigned declines to provide weight to that opinion. Dr. Bansal opined claimant sustained a permanent impairment of 7 percent lower extremity due to decrements in range of motion of the ankle. However, Dr. Bansal recommended no permanent restrictions as a result of the left ankle condition such that would support a finding the condition resulted in loss of use.

When the record with respect to claimant's left ankle injury is viewed as a whole, it is determined claimant failed to prove by a preponderance of the evidence that the injury of 2004 qualifies as a first loss under the Second Injury Compensation Act. Following a six-month period of conservative treatment in 2004, claimant never returned for additional medical treatment. No activity restrictions were imposed following claimant's release from care in September 2004, nor have any subsequent restrictions been recommended. Following the injury, claimant participated in five jobs which placed notable stress on the left ankle by way of walking, climbing, and/or prolonged time on one's feet. Although claimant testified he later resorted to icing and elevating his ankle in the evenings, there is no evidence the left ankle condition resulted in claimant missing work or impacting claimant's employment in any way. Although claimant received a VA disability rating, the basis for that rating is unclear and was not granted until October 2014, a decade following the injury and three years following the work injury. The rating of Dr. Bansal was similarly issued over a decade following the injury and three years following the work injury. Based on these facts, it is determined claimant failed to prove the 2004 injury resulted in a loss of use of the left ankle.

As claimant failed to prove he sustained a first qualifying loss, claimant is not entitled to benefits from the Second Injury Fund of Iowa.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: $100.00 filing fee, $19.44 service fees, $140.00 cost of claimant's deposition transcript, and $3,495.00 for Dr. Bansal's independent medical evaluation. (Ex. 19, pp. 255-261) The costs filing fee, services fees, and transcript fee are allowable costs and are taxed to defendant-employer and insurance carrier.

The undersigned determined claimant was entitled to reimbursement of a portion of Dr. Bansal's IME pursuant to Iowa Code section 85.39. Specifically, I awarded reimbursement in the amount of $2,330.00, leaving a remaining balance of $1,165.00 unpaid. No portion of this balance is taxed as a cost pursuant to rule 4.33, as Dr. Bansal's invoice fails to identify what portion of his fee is attributable solely to report preparation. In accordance with the Iowa Supreme Court ruling in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), no portion of Dr. Bansal's IME fee is taxed to any of the defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendant-employer and defendant-insurance carrier shall pay unto claimant fifty (50) weeks of permanent partial disability benefits commencing June 11, 2014 at the weekly rate of five hundred forty-three and 86/100 dollars ($543.86).

Defendant-employer and defendant-insurance carrier shall pay accrued weekly benefits in a lump sum.

Defendant-employer and defendant-insurance carrier shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant-employer and defendant-insurance carrier shall receive credit for benefits paid.

Defendant-employer and defendant-insurance carrier shall reimburse claimant two thousand three hundred thirty and 00/100 dollars ($2,330.00) of the cost of Dr. Bansal's independent medical examination fee.

Defendant-employer and defendant-insurance carrier shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs of two hundred fifty-nine and 44/100 dollars ($259.44) are taxed to defendant-employer and defendant-insurance carrier pursuant to 876 IAC 4.33 as set forth in the decision.

Claimant shall take nothing by way of benefits from the Second Injury Fund of Iowa.

Signed and filed this 8th day of April, 2016.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

James Neal
Attorney at Law
6611 University Ave., Ste. 200
Des Moines, IA 50324-1655
jneal@smalaw.net

James W. Bryan
Attorney at Law
1089 Jordan Creek Pkwy., Ste. 360
West Des Moines, IA 50266
jbryan@travelers.com

Sarah Brandt
Assistant Attorney General
Department of Justice-Special Litigation
Hoover State Office Building
Des Moines, IA 50319
Sarah.brandt@iowa.gov

EJF/sam

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