BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 15 2017
WORKERS' COMPENSATION

TIMOTHY GELLES, Claimant, vs. BIOSOLIDS MANAGEMENT GROUP, Employer, and AUTO-OWNERS INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos.: 5056091, 5056194, 5056195 ARBITRATION DECISION Head Notes: 1402.40, 1803, 1804, 3001, 3002, 4100

Claimant Timothy Gelles filed a petition in arbitration on January 25, 2016, File Number 5056091, alleging he sustained an injury to his back, pelvis, hip, lungs, ribs, and body as a whole while working for the defendant, Biosolids Management Group ("Biosolids"), on July 28, 2015. Biosolids, and its insurer, the defendant, Auto-Owners Insurance Company ("Auto-Owners"), filed an answer on February 17, 2016, admitting Gelles had sustained a work injury.

On February 17, 2016, Gelles filed a second petition in arbitration, File Number 5056094, alleging he sustained an injury to his right lower extremity while working for Biosolids on February 2, 2015. Biosolids and Auto-Owners filed an answer on March 16, 2016. The same date Gelles filed a third petition in arbitration, File Number 5056095, alleging he sustained an injury to his right lower extremity while working for Biosolids on February 19, 2015. Biosolids and Auto-Owners filed an answer to the third petition on March 16, 2016.

An arbitration hearing was held on January 18, 2017, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney John Dougherty represented Gelles. Gelles appeared and testified. Eric Weinberg and Bill Dory appeared and testified on Gelles's behalf. Attorney Matt Phillips represented Biosolids and Auto-Owners. Exhibits 1 through 13 and A through M were admitted into the record. The record was left open through February 8, 2017, for the receipt of post-hearing briefs. At that time the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Biosolids and Auto-Owners waived all affirmative defenses.

FILE NO. 5056091

STIPULATIONS

1. An employer-employee relationship existed between Gelles and Biosolids at the time of the alleged injury.

2. Gelles sustained an injury on July 28, 2015, which arose out of and in the course of his employment with Biosolids.

3. The alleged injury was the cause of temporary disability during a period of recovery.

4. The alleged injury is a cause of permanent disability.

5. Temporary benefits are no longer in dispute.

6. The disability is an industrial disability.

7. The commencement date for permanent partial disability benefits is November 16, 2016.

8. At the time of Gelles's alleged injury he was married and entitled to six exemptions.

9. Medical benefits are no longer in dispute.

10. Gelles was paid forty-five weeks and five days of temporary total disability benefits from January 1, 2016 through November 15, 2016, at the rate of $669.90 per week.

11. Prior to the hearing Gelles was paid nine weeks of permanent partial disability benefits at the rate of $669.90 per week and ongoing.

ISSUES

1. Has Gelles established that he is permanently and totally disabled under the statute or under the odd lot doctrine, or if not, what is the extent of his permanent disability?

2. What is Gelles's rate?

3. Is Gelles entitled to reimbursement of an independent medical examination?

4. Is Gelles entitled to an award of penalty benefits?

5. Should costs be assessed against either party?

FILE NO. 5056194

STIPULATIONS

1. An employer-employee relationship existed between Gelles and Biosolids at the time of the alleged injury.

2. Temporary benefits are no longer in dispute.

3. If Gelles has sustained a permanent disability, the disability is a scheduled member disability to the right lower extremity.

4. At the time of Gelles's alleged injury he was married and entitled to six exemptions.

5. Medical benefits are no longer in dispute.

6. Credits are not in dispute.

ISSUES

1. Did Gelles sustain an injury on February 2, 2015, which arose out of and in the course of his employment with Biosolids?

2. Is the alleged injury a cause of temporary disability during a period of recovery?

3. Is the alleged injury a cause of permanent disability?

4. If Gelles has sustained a permanent disability, what is the extent of disability?

5. If Gelles has sustained a permanent disability, is the commencement date for permanent partial disability benefits February 2, 2015?

6. What is Gelles's rate?

7. Is Gelles entitled to reimbursement for an independent medical examination?

8. Should Gelles be awarded penalty benefits?

FILE NO. 5056195

STIPULATIONS

1. An employer-employee relationship existed between Gelles and Biosolids at the time of the alleged injury.

2. Temporary benefits are no longer in dispute.

3. If Gelles has sustained a permanent disability, the disability is a scheduled member disability to the right lower extremity.

4. At the time of Gelles's alleged injury he was married and entitled to six exemptions.

5. Medical benefits are no longer in dispute.

6. Credits are not in dispute.

ISSUES

1. Did Gelles sustain an injury on February 19, 2015, which arose out of and in the course of his employment with Biosolids?

2. Is the alleged injury a cause of temporary disability during a period of recovery?

3. Is the alleged injury a cause of permanent disability?

4. If Gelles has sustained a permanent disability, what is the extent of disability?

5. If Gelles has sustained a permanent disability, is the commencement date for permanent partial disability benefits February 19, 2015?

6. What is Gelles's rate?

7. Is Gelles entitled to reimbursement for an independent medical examination?

8. Should Gelles be awarded penalty benefits?

FINDINGS OF FACT

Gelles is married. Gelles attended high school, but he did not graduate, and he later earned a GED. (Exhibit H, page 50; Transcript, pp. 10, 48) In 1988, Gelles

obtained a commercial driver's license through Jay Truck Driving Training Center. (Ex. H, p. 50) At the time of the hearing he was fifty. (Tr., pp. 10, 48)

During most of his adult life Gelles has worked as a truck driver, driving trucks and loading and unloading tractor trailers. (Ex. H, pp. 51-53; Tr, p. 11) Gelles has worked for a number of companies as a truck driver and he has been self-employed. (Ex. H, pp. 51-55; Tr., p. 49) In addition to driving a tractor trailer, Gelles reported he has been responsible for moving dollies, opening the truck hood to check fluids in the engine compartment, pulling the kingpin to release the tractor from the trailer, checking the wiring underneath the truck, loosening frozen brakes, dragging hoses, lifting boxes, and putting on load blocks and straps. (Tr., pp. 12-15) Gelles also has experience working as a welder, laborer, cook and dishwasher, and in shipping and receiving. (Ex. H, pp. 52-53; Tr., pp. 10-12, 49-51)

In February 2014, Biosolids hired Gelles as a truck driver. (Ex. H, p. 51; Tr., pp. 15, 51) Gelles was responsible for driving tractor trailers, climbing up and down stairs several times per day, shoveling lime off the floor into the trailers by hand, and digging out lime from trailers by hand. (Tr., pp. 15-16) Gelles was paid $15.00 per hour as a truck driver. (Tr., pp. 54-55)

In August 2014, Biosolids moved Gelles to a sales manager position where he was initially paid $35,000.00 per year. (Tr., pp. 54-55) Gelles later received a raise to $45,000.00 per year. (Tr., pp. 54-55) Gelles never had salesmen working for him, and the company employed between three and eight individuals. (Tr., p. 77) Gelles was responsible for looking over employees' time sheets. (Tr., p. 53)

When performing his sales duties, Gelles drove into rural Iowa, he would approach farmers, and he would try to get the farmers to agree to land apply lime from Biosolids. (Tr., pp. 51-52) In addition to his salary, Gelles received commissions and bonuses. (Tr., pp. 55-56) Biosolids paid Gelles commissions based on the amount of lime farmers accepted, the distance the farmland was from Biosolids, and whether the farmers picked up the lime, whether Biosolids hauled the lime, and whether Biosolids hauled and spread the lime. (Tr., p. 55) Gelles's paystubs for the thirteen weeks before his injury document he received regular commissions. (Ex. 11; K)

After he was moved to sales, Gelles continued to drive a tractor trailer two to five days per week because Biosolids had a high employee turnover rate. (Tr., p. 53, 58-59, 78) Gelles testified every week of his employment he drove a tractor trailer. (Tr., pp. 58-59)

Gelles sustained injuries before he worked for Biosolids. Gelles underwent a left knee scope for torn cartilage in 1984, sustained right knee nerve damage in January 1998, injured his right shoulder in April 2009, sprained his right ankle, and tore a ligament in his left wrist in 2007. (Ex. H, p. 55) Gelles received workers' compensation for his 1998 and 2007 injuries. (Ex. H, p. 56; Tr., p. 18)

Gelles was also diagnosed with Parkinson's disease before he commenced his employment with Biosolids. (Exs. D; E; H, p. 59) Gelles initially noticed he had a tremor and that his right hand was not working properly. (Tr., p. 20) In 2011 Gelles's physician suspended his commercial driver's license medical card, until his symptoms were controlled with medication. (Tr., pp. 21, 49, 59-60) Since 2011, Gelles has not been restricted from working due to Parkinson's disease. (Tr., pp. 75-76) Gelles relayed his condition makes him slower, he has problems with dexterity and fine motor skills, but his Parkinson's disease does not affect strength or his ability to work as a truck driver. (Tr., p. 20, 21, 44-45) Gelles has held a commercial driver's license since 2012. (Tr., pp. 22, 49) Gelles does not know how to type and believes his dexterity problem would make typing difficult. (Tr., pp. 44-45)

Gelles testified when he went to Biosolids, "I was able to lift anything I wanted basically within reason. I mean I never – my whole life was spent lifting from carnival – pulling steel rides together to filling boxes of meat when I was driving to, you know – I was overweight. And other than that, you know, I was in fair shape." (Tr., p. 18) After his work injury in 2007, Gelles underwent a functional capacity evaluation that indicated he was capable of working in the very heavy category of work. (Tr., p. 19; Ex. 4, p. 52)

Gelles reported that on February 2, 2015, he stepped into a hole while working for Biosolids and he sprained his ankle. (Tr., pp. 46-47) Gelles received treatment from Judith Nayeri, D.O. (Ex. 5) Gelles attended an appointment with Dr. Nayeri on February 25, 2015. (Ex. 5, p. 57) Gelles reported he rolled his ankle on uneven ground at work on February 2, 2015, and his symptoms improved until he slipped on the ice on February 19, 2015, causing him to twist his ankle again and that he felt a pop. (Ex. 5, p. 57) Gelles complained of pain, swelling, and decreased range of motion in his ankle. (Ex. 5, p. 57) Dr. Nayeri assessed Gelles with a right ankle sprain, and referred him for therapy. (Ex. 5, p. 58)

On March 2, 2015, Gelles attended a follow-up appointment with Dr. Nayeri. (Ex. 5, p. 59) Gelles reported his right ankle pain had improved, but he had some soreness on the lateral aspect of his right foot and ankle. (Ex. 5, p. 59) Dr. Nayeri documented Gelles's gait was normal and his range of motion testing was normal for the foot, ankle, and toes in all planes. (Ex. 5, p. 59)

Gelles returned to Dr. Nayeri on April 17, 2015. (Ex. 5, p. 63) Dr. Nayeri documented Gelles had mild swelling of the lateral malleolus, his gait was normal, and his range of motion testing was normal for the foot, ankle, and toes in all planes. (Ex. 5, p. 63) Dr. Nayeri documented Gelles had mild tenderness at the lateral malleolus with palpitation, but found no instability of the ankle mortise. (Ex. 5, p. 63) Gelles did not miss any work due to his right ankle. (Tr., pp. 47, 57)

On July 28, 2015, Gelles was loading a trailer and climbed up the trailer to see how much room was left. (Tr., pp. 16-17) Gelles was overcome by ammonia fumes, he passed out, and he fell off the trailer, landing onto a speed bump, approximately ten feet below. (Tr., pp. 16-18)

Gelles was transported to St. Joseph Medical Center in St. Joseph, Missouri for emergency medical treatment. (Ex. 7) Gelles underwent computerized tomography scans of his abdomen and pelvis and chest, which revealed Gelles had sustained multiple left-sided rib fractures, a pulmonary contusion, a "tiny left apical pneumothorax," and a possible left renal contusion or hemorrhage. (Ex. 7, pp. 71-74) Gelles was discharged from the hospital on August 2, 2015. (Ex. 10, p. 89)

On August 5, 2015, Gelles attended an appointment with Daniel Miller, D.O., an occupational medicine physician, complaining of rib pain, shortness of breath, and back pain. (Ex. 10, p. 89) Dr. Miller assessed Gelles with multiple rib fractures and back pain, administered a Toradol injection, and continued Gelles's current pain medication. (Ex. 10, p. 91) Dr. Miller found Gelles was fit for modified duty, with telephone work only at home, and imposed restrictions of no lifting over two pounds, no pushing or pulling over five pounds, no overhead work, no driving, and to avoid repetitive bending/twisting. (Ex. 10, p. 92)

Gelles attended a follow-up appointment with Dr. Miller on August 12, 2015, complaining of rib pain with occasional sharp pain, shortness of breath, and low back pain. (Ex. 10, p. 94) Dr. Miller documented Gelles was working from home with restrictions, continued his restrictions, and issued a prescription for OxyCodone. (Ex. 10, pp. 94-97)

Dr. Miller ordered magnetic resonance imaging of Gelles's lumbar spine. (Ex. 10, pp. 98-99) After receiving the imaging, Dr. Miller continued Gelles's restrictions and pain medication, and documented Gelles should ambulate with a walker. (Ex. 10, p. 100) Dr. Miller prescribed physical therapy, which Gelles received over the course of many months.

In late September 2015, Dr. Miller ordered additional magnetic resonance imaging of Gelles's pelvis and lumbar spine. (Ex. 10, pp. 106-109) The reviewing radiologist's impressions noted, a "[h]ealing fracture of the right sacral ala and right lateral aspect of the S1 segment," a healing fracture of the left ischial and pubic ramus, residual edema in the left obturator, mild right hip joint effusion, and degenerative disc disease at L5-S1. (Ex. 10, p. 106-09)

On September 30, 2015, Gelles returned to Dr. Miller complaining of rib and lower back pain, but reporting his breathing had improved. (Ex. 10, p. 110) Gelles told Dr. Miller he was sleeping in a recliner because he could not tolerate lying down in a bed, and he was experiencing occasional swelling in both ankles until he would get up and move around. (Ex. 10, p. 111) Dr. Miller refilled Gelles's medication and imposed restrictions of no lifting over five pounds, no pushing/pulling over ten pounds, no overhead work, no driving/operating dangerous equipment, and to engage in sit down work as tolerated. (Ex. 10, pp. 111-12)

Gelles continued to complain of rib and low back pain. (Ex. 10, p. 113) During his appointment on October 28, 2015, Dr. Miller refilled Gelles's medication, ordered a

sitting donut, opined Gelles could drive a private, but not a commercial vehicle, and imposed restrictions of no lifting over ten pounds, no pushing/pulling over twenty-five pounds, no overhead work, no driving/operating dangerous equipment, to stand, walk, and sit as tolerated, and to walk on even ground only. (Ex. 10, pp. 114-15)

During his appointment on November 25, 2015, Gelles reported he reinjured his ribs "due to tumble" and his low back was tender. (Ex. 10, p. 116) Gelles complained of numbness in both thighs, with the right greater than the left and swelling in his right ankle. (Ex. 10, p. 116)

Gelles attended a follow-up appointment with Dr. Miller on December 23, 2015, reporting rib pain and noting when he drives a truck "every bump makes it seem like someone is stabbing a knife into his back." (Ex. 10, p. 119) Gelles relayed he could not stand very long without pain, his pain was worse in the morning, and his pain was worse after he has been sitting for a long period of time. (Ex. 10, p. 119)

Following an inquiry from Gelles's attorney requesting a referral to pain management and injections, the adjuster for Auto-Owners contacted Dr. Miller on January 6, 2016. (Ex. 10, p. 122) Dr. Miller responded the next day, noting Gelles was making slow, but steady improvement, pelvic fractures are very painful and take a significant time to heal, the imaging did not support surgical treatment or injections, and he did not believe Gelles should be referred for pain management or injections. (Ex. 10, p. 123)

Dr. Miller continued Gelles's restrictions following his January 22, 2016 appointment, and ordered additional imaging. (Ex. 10, p. 124) Gelles continued to complain of rib pain that was more severe with sitting and driving, low back pain, and a burning sensation in his middle back with standing. (Ex. 10, pp. 131-35) Dr. Miller continued Gelles's restrictions, medication, and physical therapy. (Ex. 10, p. 131-34) Dr. Miller noted Gelles appeared to have plateaued and he recommended a referral to an orthopedic surgeon. (Ex. 10, p. 133)

On March 23, 2016, Gelles attended an appointment with Todd Harbach, M.D., an orthopedic surgeon, complaining of low back and hip pain. (Ex. 8, p. 76) Gelles relayed to Dr. Harbach his second, third, and forth toes felt like he has a ball under his foot, standing and walking caused him the most pain, and he would sit down to alleviate the pain. (Ex. 8, p. 76) Dr. Harbach opined Gelles was not a surgical candidate and noted, "[e]verything that I see on his lumbar spine is chronic in nature and not related to his fall" and recommended continued core strengthening, pool therapy, an exercise bicycle, and significant weight loss. (Ex. 8, p. 76)

Gelles returned to Dr. Miller on April 4, 2016. (Ex. 10, p. 137) Dr. Miller continued his medication, and imposed restrictions of no lifting over twenty pounds, no pushing/pulling over forty pounds, to avoid repetitive bending/twisting, and no overhead work. (Ex. 10, p. 139)

In late June 2016, Dr. Miller ordered ankle magnetic resonance imaging and a chest computerized tomography scan for Gelles. (Ex. 10, p. 146) With respect to the ankle imaging, the reviewing radiologist listed an impression of "[t]enosynovitis of the posterior tibialis tendon and flexor digitorum longus tendons," and "[i]ncreased T2 signal intensity within the superficial and deep fibers of the deltoid ligament which could correspond with sprain". (Ex. 10, p. 148) The reviewing radiologist noted the chest scan revealed "[n]on-osseous union of left ribs 6, 7, 8, 9, and 10, posterior lateral thorax, with greater chondrocalcinosis anteriorly of the left ribs, likely posttraumatic, when compared to the right anterior ribs cartilage," and healed rib fractures four and five. (Ex. 10, p. 150)

During his appointment with Dr. Miller on June 30, 2016, Gelles complained his ribs were tender, and he was experiencing low back and groin pain. (Ex. 10, p. 151) Gelles reported his ankle was still swelling and "[w]hen he gets on uneven ground the ankle will roll so he will be walking on the side of his foot. Flexion and extension is still difficult. Will be very painful at times. The main area of pain is still on the outside of the ankle." (Ex. 10, p. 151)

Dr. Miller performed an independent medical examination of Gelles's right ankle on July 20, 2016. (Ex. 10, pp. 154-56) Dr. Miller opined Gelles sustained injuries to his right ankle while working for Biosolids on February 2, 2015 and February 19, 2015, and his ankle complaints were causally related to the February 2015 work injuries. (Ex. 10, p. 156) Dr. Miller recommended Gelles use a brace or ankle air splint while walking and that he be examined by an orthopedist or a podiatrist. (Ex. 10, p. 156)

On August 15, 2016, Gelles was examined by Joseph Galles, M.D., an orthopedic surgeon. (Ex. 8, p. 79) Gelles told Dr. Galles he was injured during a fall at work and his pain is aggravated by bending, climbing stairs, walking, and standing. (Ex. 8, p. 79) Dr. Galles assessed Gelles with acquired varus deformity of the right ankle, a strain of the right foot peroneal tendon, and morbid obesity. (Ex. 8, p. 79) Dr. Galles opined:

> It is more likely than not a cavovarus alignment through the ankle and hindfoot which is a pre-existing condition. The cavovarus alignment has led to increased strain on the peroneal tendons exacerbated by increased activity and may be exacerbated by an inversion mechanism injury. It is impossible to determine whether the work-related injury is the main factor for his symptoms; however, it certainly could be a contributing factor. The work-related injury did not lead to the cavovarus alignment of his foot.

(Ex. 8, p. 79) Dr. Galles recommended Gelles wear a lace-up ankle brace during ambulation, and to avoid uneven ground for a month. (Ex. 8, p. 79)

Dr. Miller recommended Gelles be examined by a chest surgeon. (Ex. 10, p. 162) Michael Willey, M.D., an orthopedic surgeon with the University of Iowa Hospitals and Clinics ("UIHC"), examined Gelles on August 30, 2016. (Ex. 9, p. 85) Gelles

complained of rib pain that wakes him up at night, and that is worse with deep inspiration and exertion. (Ex. 9, p. 85) Dr. Willey ordered x-rays of the ribs and the reviewing radiologist listed an impression of "multiple subacute healing fractures with callus on the left side involving the 3, 4, 5, 6, 7, 8, 9, and 10 ribs. Nonunion of fractures at ribs 7, 8." (Ex. 9, p. 84) Dr. Willey agreed Gelles had nonunion rib fractures at multiple levels. (Ex. 9, p. 86) Dr. Willey did not recommend surgery, but recommended Gelles lose weight, quit smoking, and take a vitamin D supplement. (Ex. 9, pp. 86-88)

On September 14, 2016, the attorney for Biosolids and Auto-Owners sent Dr. Galles a form letter regarding his opinions concerning Gelles's alleged ankle injuries. (Ex. 8, pp. 81-83) Dr. Galles checked he agreed with the contentions and he did not provide any written comments. (Ex. 8, pp. 81-83) Dr. Galles agreed the February 2015 injuries did not cause, materially aggravate, or substantially contribute to the development of Galles's cavovarus alignment of the right foot and ankle or to his current symptoms and need for treatment. (Ex. 8, p. 82) Dr. Galles further agreed the February 2015 incidents "merely contributed to a temporary aggravation of his preexisting condition," and during his examination, Gelles did not disclose his prior neurologic complaints involving his right foot and ankle. (Ex. 8, p. 82)

Gelles attended additional appointments with Dr. Miller reporting he continued to have rib pain, ankle pain and swelling, and back pain with lifting, standing, and walking for extended periods. (Ex. 10, pp. 164-70) Dr. Miller continued his restrictions and recommended a functional capacity evaluation. (Ex. 10, pp. 164-71)

On November 17, 2016, Gelles attended a functional capacity evaluation with Advantage Physical Therapy and Rehab. (Ex. 3, p. 37) The examining physical therapist found Gelles gave maximal, consistent effort. (Ex. 3, p. 38) The physical therapist found Gelles can: (1) lift floor to waist fifty pounds rarely, forty pounds occasionally, twenty-five pounds frequently, and ten pounds constantly; (2) lift waist to overhead thirty-five pounds rarely, twenty-five pounds occasionally, and fifteen pounds frequently; (3) horizontal lift fifty pounds rarely, forty pounds occasionally, thirty pounds frequently, and twenty pounds constantly; (4) push fifty pounds rarely, forty pounds occasionally, thirty pounds frequently, and twenty pounds constantly; (5) pull fifty-five pounds rarely, forty-five pounds occasionally, thirty-five pounds frequently, and twenty-five pounds constantly; (6) right and left carry forty-five pounds rarely, thirty-five pounds occasionally, twenty pounds frequently, and ten pounds constantly; (7) front carry fifty pounds rarely, forty pounds occasionally, thirty pounds frequently, and twenty pounds constantly; and (8) he has a right hand and left hand grip of a maximum of 110 pounds. (Ex. 3, pp. 42-43) The physical therapist further found Gelles can occasionally engage in elevated work, tolerate prolonged forward trunk posturing while sitting or standing, engage in repetitive rotation while sitting or standing, crawl, kneel, repetitively squat, sit, stand, walk, stair climb, and step ladder climb. (Ex. 3, pp. 43-44) The therapist determined Gelles can never engage in deep static crouching. (Ex. 3, p. 44)

Jacqueline Stoken, D.O., a physiatrist, conducted an independent medical examination of Gelles in November 2016. (Ex. 1, p. 1) Dr. Stoken examined Gelles

and reviewed his medical records. (Ex. 1, p. 1) Dr. Stoken diagnosed Gelles with multiple contusions to the back, pelvis, and hips, multiple rib fractures, a sacral fracture, a right ankle sprain and resprain, and chronic pain in the low back, pelvis, right hip, ribs, and right ankle. (Ex. 1, p. 12)

Using Table 15-3, page 384, of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Stoken opined Gelles falls into DRE Lumbar Category II, and assigned a five percent impairment to the whole person. (Ex. 1, p. 12) Using Table 17-11, page 537, of the AMA Guides, Dr. Stoken assigned a seven percent lower extremity, or three percent whole person impairment with an ankle extension of zero degrees. (Ex. 1, p. 12) Dr. Stoken used Table 17-12, page 537, of the AMA Guides, and assigned a two percent lower extremity impairment or a one percent whole person impairment for an ankle inversion of twenty degrees, and a separate two percent lower extremity impairment or a one percent whole person impairment with an ankle eversion of zero degrees. (Ex. 1, p. 12) Dr. Stoken did not find Gelles sustained any permanent impairment to his pelvis, hip, or ribs. (Ex. 1, p. 13) Using the Combined Values Chart on page 604 of the AMA Guides, Dr. Stoken combined the impairments to the lumbar spine and right ankle, for a combined impairment of ten percent of the whole person. (Ex. 1, p. 13)

Dr. Stoken recommended permanent work restrictions as set forth in the November 17, 2016, valid functional capacity evaluation, in the light to low medium category of work, and opined Gelles should be able to perform all lifting, carrying, and pushing and pulling activities recommended by the functional capacity evaluation, and recommended he avoid lifting waist to overhead on a constant basis, avoid activities that require assuming and maintaining deep-static crouch position, and transition from sitting to standing to walking, as needed. (Ex. 1, p. 13) Dr. Stoken found Gelles will need pain management in the future, including periodic physician visits, medication, and/or injections. (Ex. 1, p. 13)

On November 30, 2016, Dr. Miller examined Gelles, assigned permanent restrictions consistent with the functional capacity evaluation, and indicated he would follow Gelles for pain management. (Ex. 10, pp.172-74) Dr. Miller imposed permanent restrictions of no lifting over fifty pounds, no pushing or pulling over fifty pounds, to avoid repetitive bending/twisting, and no driving or operating of dangerous equipment and commercial motor vehicles. (Ex. 10, p. 174)

Counsel for Gelles sent Dr. Miller a form letter on December 14, 2016, regarding Gelles. Dr. Miller signed the letter, agreeing the letter represents his opinions, without providing any comments, as follows:

> Based on the history provided in your records and your treatment of Mr. Gelles you believe the necessity for your care and treatment has arisen from the fall of 7-28-15. Specifically you note that the pre-existing condition of dystonia or Parkinson's has not necessitated any treatment by you.

> You believe that as a result of the fall of 7-28-15 that Mr. Gelles is at MMI and that permanent restrictions are prudent. Upon further review of the functional capacity evaluation dated 11/17/16, you concur with the restrictions set forth therein. Specifically, as a result of the injury of 7-28-15 you believe that Mr. Gelles should utilize this FCE as a guide to any future activities. Additionally you would incorporated your listed restrictions of 11-30-16 into Mr. Gelles's permanent restrictions. You would highlight your opinion that Mr. Gelles would need to look for a job wherein he would be allowed to transition between sitting, standing and walking as needed.

(Ex. 10, p. 175)

On December 22, 2016, Dr. Miller wrote a letter finding Gelles sustained rib and sacral fractures as a result of his July 28, 2015 work injury, excluding the ankle. (Ex. B, p. 9) Using Table 15-9, page 428, of the AMA Guides, Dr. Miller assigned a five percent impairment to the whole person based on "a healed sacral fracture without displacement," but with residual signs. (Ex. B, p. 9) With respect to the rib fractures, Dr. Miller noted the AMA Guides do not provide a guide for rib fractures,

> [h]owever, due to non-healing rib fractures causing significant pain with movement, breathing, ect., I believe that an impairment for the rib fractures is warranted. As ribs articulate with the thoracic vertebrae, I think it is reasonable that Table 15-4, page 389, criteria for rating impairment due to thoracic spine injury is used as a guide. A history and physical findings are compatible with a specific injury or illness (marked pain with palpation over the left ribs) and the CAT scan shows non-complete healing of left rib fractures 6 through 10 (I consider this as a transverse process fracture with displacement without vertebral body fracture, this injury falls into the DRE thoracic category 2 with a 5% impairment of the whole person.

(Ex. B, p. 9) Using the Combined Values Chart, at page 604, Dr. Miller assigned Gelles a ten percent whole person impairment for his rib and sacral fractures. (Ex. B, p. 9)

Gelles attended a second functional capacity evaluation on December 16, 2016 at Pella Regional Health Center, which demonstrated improved lifting capability. (Ex. A) After reviewing both functional capacity evaluations from November and December 2016, Dr. Miller recommended permanent restrictions of lifting twenty pounds from floor to waist constantly, lifting fifteen pounds from waist to overhead constantly, horizontal lifting fifteen pounds constantly, twenty-five pounds pushing and pulling constantly, ten pounds right and left carry constantly, fifteen pounds front carry constantly, and right and left hand gripping of 110 pounds. (Ex. M, p. 73) Dr. Miller also found Gelles could engage in frequent rotation while standing or sitting, walking, and sitting and standing allowing for frequent position changes, occasional forward bending/standing, crawling,

kneeling, stair climbing, step ladder climbing, and rare static crouching and repetitive deep crouching. (Ex. M, p. 73) Dr. Miller also opined Gelles should avoid operating a commercial motor vehicle due to residual pain from his nonunion rib fractures and sacral fracture, because "these cause a potential safety issue with driving a commercial motor vehicle in the event Mr. Galles would have to make rapid movements to control vehicle." (Ex. M, p. 73)

Gelles returned to work after his July 2015 work injury and he did not miss any additional work. (Tr., p. 57) Gelles continued to work for Biosolids until Biosolids ceased operating. (Tr., p. 57) Gelles last worked for Biosolids in February 2016. (Tr., p. 58) Biosolids experienced financial difficulties starting in December 2015. Biosolids issued a check to Gelles which did not clear the bank due to insufficient funds. (Tr., pp. 30-31) Exhibit 12 contains checks from December 30, 2015 through January 27, 2016, which did not clear the bank. Gelles also paid for motel expenses, fuel, and parts that Biosolids did not reimburse him for. (Tr., pp. 31-33)

Gelles has not worked full-time since his employment with Biosolids ended. Gelles testified he applied for a sales position with CNC Cycle, but he never received a call back. (Tr., p. 45) Gelles "pushed snow" for a friend on a couple of occasions in December 2015 and January 2016, and he tried to operate a Bobcat. (Tr., pp. 33-34) Gelles reported he ran the Bobcat for thirty to forty-five minutes and told his friend he could not do it because of the bouncing, jarring, and twisting. (Tr., p. 35)

Gelles testified he attempted to use a tractor to re-rock a driveway, on a flat surface, but he could not tolerate operating the vehicle after ten or fifteen minutes because of the pain in his back and ribs. (Tr., p. 36) Gelles reported that before his work injury he would have been able to do that type of work for twelve hours. (Tr., p. 36) Gelles testified he would not be able to walk through a plowed field or cornfield, but possibly a bean field because the ground is more level. (Tr., p. 78)

Gelles reported he can travel in his personal vehicle for twenty minutes to two hours as long as the vehicle does not jar him, but when he drives his pickup from Knoxville to Des Moines he has to get out and stretch because his ribs become sore and tender and because of the jarring to his back. (Tr., pp. 39-40) Before his work injury Gelles did not have any difficulty walking. (Tr., p. 40) Now, when he goes to Wal-Mart he can make it about one lap through the store and then he needs to find a place to sit down. (Tr., p. 40) Gelles uses a cart to lean on in the store. (Tr., p. 40)

Gelles reported he can stand to shave and take a shower and then he needs to sit down again before getting dressed. (Tr., p. 41) Before his work injury he would go out with his wife once or twice per month. (Tr., p. 43) In the last six months he has not gone out with her because he cannot sit at a table for long and he has to move around, and he is uncomfortable. (Tr., p. 43)

Weinberg testified Gelles first worked for him full-time seventeen to eighteen years ago driving a truck and helping with landscaping. (Tr., p. 83) Weinberg has

maintained a social relationship with Gelles and did not observe Gelles had any physical limitations before his work injury. (Tr., p. 84) Weinberg testified Gelles operated a skid loader for him within the last year, and he could not complete the job. (Tr., p. 84) Weinberg reported he had to help Gelles out of the machine because he was in so much pain. (Tr., p. 85)

Weinberg testified Gelles cannot stand for more than ten to fifteen minutes without needing to sit down. (Tr., p. 86) Before his work injury Gelles enjoyed target shooting with Weinberg at his home. Weinberg reported that his shooting range is a block to a block and a half from his shop and that Gelles used to walk to the range, but he cannot make it up the hill anymore, so they drive to the range. (Tr., p. 87)

Dory worked with Gelles for Biosolids. (Tr., p. 91) Dory reported that before his work injury Gelles could perform all the physical requirements of his job and he did not have any problem shoveling. (Tr., p. 92) Dory observed that now Gelles is stiff when he sits and has to rest and sit when ambulating short distances. (Tr., pp. 93-95)

Gelles testified his ribs on his left side feel like a "bruise that just won't go away. The more I twist or cram up, like if I'm sitting all crammed up or jerking around, it just aggravates it more." (Tr., p. 25) Gelles reported when he rolls over while sleeping his ribs and back hurt, he experiences a stabbing pain every night which interfere with his sleep. (Tr., pp. 25-26) Gelles testified he has stabbing back pain, and the more he exerts himself and is on his feet, it turns into a burning sensation, spreads out, and his right thigh becomes numb toward his groin area, but does not extend below the knee. (Tr., p. 24) Gelles testified his ankle still bothers him and when he walks on uneven ground he rolls over on the side of his foot, which is painful. (Tr., p. 47)

CONCLUSIONS OF LAW

I. Nature of the Injury

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

> [I]t is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's

> premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979). The parties stipulated Gelles sustained a permanent injury as a result of the July 2015 work injury. Biosolids and Auto-Owners dispute Gelles's right ankle complaints are causally related to the alleged February 2015 incidents.

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, [i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

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

It is well-established in workers' compensation that "if a claimant has a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> [A] disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when

> there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

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

Gelles alleges he sustained injuries to his permanent injuries to his right ankle as a result of incidents occurring in February 2015. The petitions for File Numbers 5056194 and 5056195 both allege Gelles injured his ankle after slipping on ice. The petitions are not consistent with Gelles's testimony at hearing, or his medical records.

During his initial appointment with Dr. Nayeri on February 25, 2015, Gelles reported he rolled his ankle on uneven ground at work on February 2, 2015, and his symptoms improved until he slipped on the ice on February 19, 2015, causing him to twist his ankle again and that he felt a pop. (Ex. 5, p. 57) Gelles complained of pain, swelling, and decreased range of motion in his ankle. (Ex. 5, p. 57) Dr. Nayeri assessed Gelles with a right ankle sprain, and referred him for therapy. (Ex. 5, p. 58) There is no documentation Gelles received any additional treatment from Dr. Nayeri for his ankle complaints after April 17, 2015. (Ex. 5)

On July 28, 2015, Gelles sustained a work injury when he fell from a truck onto a speed bump at work. Gelles was hospitalized from July 28, 2015 through August 2, 2015, and attended his first appointment with his treating physician, Dr. Miller, on August 5, 2015. (Exs. 7, 10, p. 89) As a result of the fall, Gelles sustained fractures to his ribs and sacrum. Dr. Miller assessed Gelles with multiple rib fractures and back pain. (Ex. 10, p. 91) Dr. Miller treated Gelles for over a year, ordered a series of imaging, and referred him to Dr. Harbach, an orthopedic surgeon, with respect to his back complaints, and Dr. Willey, an orthopedic surgeon at the UIHC, with respect to his rib pain. (Exs. 7-9)

During his treatment with Dr. Miller, Gelles complained of ankle swelling and pain. (Ex. 10) On July 20, 2016, Dr. Miller opined Gelles had sustained injuries to his right ankle while working for Biosolids on February 2, 2015 and February 19, 2015, and his ankle complaints were causally related to the February 2015 injuries. (Ex. 10, pp. 154-56) Dr. Miller recommended Gelles be examined by an orthopedist or a podiatrist. (Ex. 10, p. 156)

Dr. Galles, an orthopedic surgeon, examined Gelles in August 2016. (Ex. 8, p. 79) Dr. Galles assessed Gelles with acquired varus deformity of the right ankle, a strain of the right foot peroneal tendon, and morbid obesity. (Ex. 8, p. 79) Dr. Galles opined,

> It is more likely than not a cavovarus alignment through the ankle and hindfoot which is a pre-existing condition. The cavovarus alignment has lead to increased strain on the peroneal tendons exacerbated by increased activity and may be exacerbated by an inversion mechanism

> injury. It is impossible to determine whether the work-related injury is the main factor for his symptoms; however, it certainly could be a contributing factor. The work-related injury did not lead to the cavovarus alignment of his foot.

(Ex. 8, p. 79) Dr. Galles recommended Gelles wear a lace-up ankle brace during ambulation, and to avoid uneven ground for a month. (Ex. 8, p. 79)

Dr. Willey examined Gelles on August 30, 2016, and ordered x-rays, which revealed left-sided nonunion rib fractures at multiple levels. (Ex. 9) Dr. Willey did not recommend surgery. (Ex. 9, pp. 86-88)

Gelles retained Dr. Stoken, a physiatrist, to conduct an independent medical examination. (Ex. 1) Dr. Stoken diagnosed Gelles with multiple contusions to the back, pelvis, and hips, multiple rib fractures, a sacral fracture, a right ankle sprain and resprain, and chronic pain in the low back, pelvis, right hip, ribs, and right ankle. (Ex. 1, p. 12) Using Table 15-3, page 384, of the AMA Guides, Dr. Stoken opined Gelles falls into DRE Lumbar Category II, and assigned a five percent whole person impairment. (Ex. 1, p. 12) Dr. Stoken found Gelles sustained a combined nine percent impairment to the right lower extremity, or five percent whole person impairment for the alleged ankle injury. (Ex. 1, p. 12) Dr. Stoken did not assign a permanent impairment rating for the injuries to Gelles's pelvis, hips, or ribs. (Ex. 1, p. 13) Using the Combined Values Chart on page 604 of the AMA Guides, Dr. Stoken assigned Gelles a combined permanent impairment of ten percent of the whole person. (Ex. 1, p. 13) Dr. Stoken recommended the permanent restrictions set forth in the November 2016 functional capacity evaluation and recommended Gelles avoid lifting waist to overhead on a constant basis, avoid activities that require assuming and maintaining deep-static crouch position, and transition from sitting to standing to walking, as needed. (Ex. 1, p. 13)

Dr. Miller, the treating occupational medicine physician, diagnosed Gelles with rib and sacral fractures. (Ex. B, p. 9) He did not address Gelles's ankle, given Gelles had been referred to a specialist, Dr. Galles. (Ex. B, p. 9) Using Table 15-9, page 428, of the AMA Guides, Dr. Miller assigned a five percent impairment to the whole person based on "a healed sacral fracture without displacement," but with residual signs. (Ex. B, p. 9) With respect to the rib fractures, Dr. Miller noted the AMA Guides do not provide a guide for rib fractures,

> [h]owever, due to non-healing rib fractures causing significant pain with movement, breathing, ect., I believe that an impairment for the rib fractures is warranted. As ribs articulate with the thoracic vertebrae, I think it is reasonable that Table 15-4, page 389, criteria for rating impairment due to thoracic spine injury is used as a guide. A history and physical findings are compatible with a specific injury or illness (marked pain with palpation over the left ribs) and the CAT scan shows non-complete healing of left rib fractures 6 through 10 (I consider this as a

> transverse process fracture with displacement without vertebral body fracture, this injury falls into the DRE thoracic category 2 with a 5% impairment of the whole person.

(Ex. B, p. 9) Using the Combined Values Chart, at page 604, Dr. Miller assigned Gelles a ten percent whole person impairment for the rib and sacral fractures. (Ex. B, p. 9)

On September 20, 2016, Dr. Galles responded to a form letter from the attorney for Biosolids and Auto-Owners, without providing any written comments, agreeing the February 2015 injuries did not cause, materially aggravate, or substantially contribute to the development of Galles's cavovarus alignment of the right foot and ankle or his current symptoms and need for any treatment. (Ex. 8, p. 81-83) Dr. Galles further agreed the incidents "merely contributed to a temporary aggravation of his preexisting condition," and during his examination, Gelles did not disclose his prior neurologic complaints involving his right foot and ankle. (Ex. 8, p. 82)

I find the opinions of Drs. Miller and Galles more persuasive than the opinion of Dr. Stoken. Gelles sustained fractures to his sacrum and ribs. Dr. Miller, the treating physician, assigned a permanent impairment rating for Gelles's sacrum injury, using Table 15-9, page 428, of the AMA Guides, which involves the rating of impairments due to selected orders of the pelvis, including the sacrum. (Ex. B, p. 9) Dr. Stoken, who was retained for purposes of performing an independent medical examination only, assigned a permanent impairment rating using Table 15-3, page 384 of the AMA Guides, which involves rating of impairments due to lumbar spine injuries. (Ex. 1, p. 12) The injury was not to Gelles's lumbar spine. And Dr. Stoken assigned no impairment rating to Gelles's nonunion rib fractures, which cause Gelles significant pain to date.

Dr. Galles examined Gelles on one occasion, and opined Gelles has a cavovarus alignment through the ankle, which was pre-existing, and noted, "[i]t is impossible to determine whether the work-related injury is the main factor for his symptoms; however, it certainly could be a contributing factor. The work-related injury did not lead to the cavovarus alignment of his foot." (Ex. 8, p. 79) Dr. Galles later responded to a form letter, without providing written comments, agreeing the February 2015 injuries did not cause, materially aggravate, or substantially contribute to the development of Galles's cavovarus alignment of the right foot and ankle or to his current symptoms and need for any treatment. (Ex. 8, p. 82) Dr. Galles further agreed the incidents "merely contributed to a temporary aggravation of his preexisting condition," and during his examination, Gelles did not disclose his prior neurologic complaints involving his right foot and ankle. (Ex. 8, p. 82)

Gelles's medical records show he experienced pain and problems with his right ankle before February 2015. During an appointment at the UIHC on March 1, 2013, Nandakumar Narayanan, M.D., noted Gelles's "right foot seemed to be sticking a little bit, concerning involvement of the right leg." (Ex. E, p. 18) Gelles also relayed he experienced problems with his right foot not picking up well during an appointment with

Lynn Struck, M.D., on April 4, 2014. (Ex. G, p. 44) Dr. Struck documented "[h]is right foot has a tendency to curl in and his toes curl down. These symptoms are worse as the day proceeds. He is working as a trucker and can do this, but ultimately he would like to look at a sedentary job." (Ex. G, p. 43) In December 2014, Gelles returned to Dr. Struck, and relayed "his pain and stiffness in the right forearm and right ankle area is about the same." (Ex. G, p. 48) Gelles did not provide an accurate and complete history to Dr. Galles during his examination.

Moreover, Dr. Stoken's opinion also appears to be based on incorrect information. The first page of her opinion provides the date of the ankle and other injuries is July 28, 2015. (Ex. 1, p. 1) Gelles's medical records do not support Gelles sustained an injury to his right ankle when he fell from the trailer onto the speed bump. And Gelles did not miss any work following February 2, 2015 and February 19, 2015 incidents. Gelles has not established the February 2, 2015 and February 19, 2015 incidents caused a permanent impairment. The record supports Gelles sustained permanent impairments to his ribs and sacrum as a result of the July 28, 2015 incident.

II. Rate

The parties stipulated that at the time of his injury Gelles was married and entitled to six exemptions. Gelles avers his average weekly earnings were $1,012.50,[1] and his rate is $677.63, using the weeks of March 30, 2015 through July 19, 2015, as the representative weeks. (Ex. 11, p. 177) Biosolids and Auto-Owners contend Gelles earned average weekly earnings of $993.73, and his rate is $666.90, using the weeks of April 27, 2015 through August 2, 2015, as the representative weeks. (Ex. K) Gelles contends Biosolids and Auto-Owners should not have included the week of his injury when calculating his rate.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The basis of compensation shall be the "weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. "Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed . . . rounded to the nearest dollar." Id. The term "gross earnings" is defined as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." Id. § 85.61. The statute expressly

[1] Exhibit 11 contains two rate calculations proposed by Gelles, one with an extra $50.00, page 178. No explanation was provided at hearing or in the post-hearing briefs regarding the $50.00. The wages records at pages 179 through 185 do not reference the extra $50.00.

provides the determination is made using "the last 13 consecutive calendar weeks immediately preceding the injury." Id. § 85.36(6).

Biosolids paid Gelles every two weeks. (Exs. 11, K) His work injury occurred on July 28, 2015. Thus, the paychecks issued on July 19, 2015, July 5, 2015, June 21, 2014, June 7, 2015, May 24, 2015, May 10, 2015, and April 12, 2015 cover the thirteen weeks before his work injury. The paycheck that covers his injury should not be used. For the thirteen weeks prior to the work injury, Gelles received wages totaling $13,162.53, as set forth in Exhibit 11, pages 177 and 179 through 185. Dividing this sum by thirteen results in a gross weekly wage of $1,012.50. According to the 2015-2016 Ratebook, covering July 1, 2015 through June 30, 2016, Gelles's weekly rate is $677.63. https://www.iowaworkcomp.gov/pdfs.

III. Extent of Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

Gelles contends he is permanently and totally disabled. Biosolids and Auto-Owners disagree. In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtain, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

"Total disability does not mean a state of absolute helplessness." Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633.

At the time of the hearing Gelles was fifty. (Tr., pp. 10, 48) Gelles did not graduate from high school, but he earned a GED. (Ex. H, p. 50; Tr, pp. 10, 48) Gelles has been diagnosed with Parkinson's disease, which affects his right hand dexterity and fine motor skills. (Tr., pp. 20, 21, 44-45) Gelles does not know how to type and he believes his dexterity problem would make typing difficult. (Tr., pp. 44-45) Gelles testified his dexterity problem did not affect his strength or ability to work as a truck driver before his July 2015 work injury. (Tr., pp. 20, 21, 44-45)

After reviewing both functional capacity evaluations from November and December 2016, Dr. Miller recommended permanent restrictions of lifting twenty pounds from floor to waist constantly, lifting fifteen pounds from waist to overhead constantly, horizontal lifting fifteen pounds constantly, twenty-five pounds pushing and pulling constantly, ten pounds right and left carry constantly, fifteen pounds front carry constantly, and right and left hand gripping of 110 pounds. (Ex. M, p. 73) Dr. Miller also found Gelles could engage in frequent rotation while standing or sitting, walking, and sitting and standing allowing for frequent position changes, occasional forward bending/standing, crawling, kneeling, stair climbing, step ladder climbing, and rare static crouching and repetitive deep crouching. (Ex. M, p. 73)

Gelles has worked in trucking for the past twenty-five years, performing medium to heavy work. While he held a commercial driver's license at the time of the hearing, Dr. Miller opined in December 2016 that Gelles should avoid operating a commercial vehicle due to residual pain from his nonunion rib fractures and sacral fracture because "these cause a potential safety issue with driving a commercial motor vehicle in the event Mr. Galles would have to make rapid movements to control [the] vehicle." (Ex. M, p. 73)

In August 2014, Biosolids moved Gelles to a sales position. (Tr., p. 54) Gelles spoke with farmers to try to convince farmers to land apply lime to their land. (Tr., pp. 51-52) Gelles performed his job duties with restrictions until Biosolids ceased operating. Gelles last worked for Biosolids in February 2016. (Tr., p. 58) As a younger man he also worked as a welder, laborer, cook and dishwasher, and in shipping and receiving. (Ex. H, pp. 52-53; Tr., pp. 10-12, 49-51)

After leaving Biosolids, Gelles attempted to work for his friend, Weinberg, removing snow with a push blade on a few occasions in December 2015 and January 2016, and operating a Bobcat or skid loader. (Tr., pp. 83-85) Gelles reported he could not tolerate the bouncing, jarring, and twisting of the equipment. (Tr., p. 35) Weinberg testified Gelles operated the skid loader on one occasion within the last year and he

could not complete the job, and Weinberg had to help him out of the vehicle because he was in so much pain. (Tr., pp. 84-85) Gelles first worked for Weinberg seventeen to eighteen years ago and Weinberg did not observe Gelles had any physical limitations before his July 2015 work injury. (Tr., p. 84)

Gelles testified he can travel in his personal vehicle for approximately twenty minutes to two hours as long as the vehicle does not jar him, but when he drives his pickup from Knoxville to Des Moines he has to get out and stretch because his ribs become sore and tender and because of the jarring to his back. (Tr., pp. 39-40)

Gelles's stamina is reduced and he has to sit down after he shaves and take a shower before he gets dressed. (Tr., p. 41) Gelles also reported he has difficulty walking, and can walk one lap in his local Wal-Mart store before he has to sit down. (Tr., p. 40) Weinberg testified he has observed Gelles cannot stand for more than ten to fifteen minutes before he needs to sit down. (Tr., p. 86) Dory worked with Gelles at Biosolids and acknowledged Gelles becomes stiff when he sits and that he needs to rest and sit when walking short distances. (Tr., pp. 93-95)

Gelles enjoys target shooting with Weinberg. Weinberg reported his shooting range is a block to a block and a half from his shop and that Gelles used to walk to the range from his shop before his work injury, but he cannot make it up the hill anymore, so they drive to the range. (Tr., p. 87)

Gelles worked in sales for Biosolids. Gelles reported he applied for a sales position with CNC Cycle, but he never received a call back. (Tr., p. 45) There is no evidence Gelles has applied for any other sales positions.

The parties did not submit vocational expert reports or other evidence of the labor market Gelles resides in. Gelles reported he applied for one job with CNC Cycle, and he asked Weinberg for work. I do not find Gelles has demonstrated he is motivated to work.

Considering Gelles's functional disability, his age, education, qualifications, experience, and ability to engage in similar employment, I conclude Gelles has sustained a forty percent industrial disability under the statute.

Additionally, I find Gelles has not established he is permanently and totally disabled under the odd-lot doctrine. Gelles did not present an opinion from a vocational expert or any labor market analysis. Gelles has worked in the Des Moines area, a large urban area. He has applied for one job in sales since Biosolids closed. Gelles has not proven he is unable to perform services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.

Gelles has established he sustained a forty percent industrial disability. He is entitled to 200 weeks of permanent partial disability benefits at the rate of $677.63, commencing on November 16, 2016.

IV. Penalty

Gelles raised the issue of penalty at hearing, but he did not address penalty in his post-hearing brief. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to 50 percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits." Iowa Code § 86.13(4)(a). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Gelles has not established he sustained a permanent impairment to his right ankle. He has not established he is entitled to penalty benefits regarding his right ankle.

Gelles testified Biosolids did not pay him for the work he performed starting in December 2015 through February 2016. Exhibit 12 contains returned checks dated December 30, 2015 through January 27, 2016. While the situation is unfortunate and

Gelles may have a civil claim under Iowa Code chapter 91A, the penalty provisions in the statute do not afford penalty benefits due to the employer's failure to pay wages for work performed.

Gelles contends he received late temporary disability payments regarding the July 2015 injury. According to the parties' stipulation, Gelles was paid forty-five weeks and five days of temporary total disability benefits from January 1, 2016 through November 15, 2016, at the rate of $669.90 per week.

Gelles testified he returned to work the day after the July 2015 injury and that he continued to work for Biosolids until February 2016, when the business ceased operating. (Tr., pp. 33, 57) Auto-Owners later received information Gelles was no longer working for Biosolids, and issued payment for temporary disability benefits from January 1, 2016 through March 9, 2016, with interest, on March 10, 2016. (Ex. I) There was a delay in payment sometime in February 2016 through March 9, 2016. When Auto-Owners discovered the delay, it paid the benefits with interest. Gelles did not present information that he contacted Auto-Owners inquiring about the delay in payment after Biosolids ceased operating. Gelles should not be awarded penalty benefits.

V. Independent Medical Examination

Gelles seeks to recover the $1,700.00 cost of Dr. Stoken's examination. Biosolids and Auto-Owners contend Gelles is not entitled to recover the cost of the examination because no physician retained by the employer had evaluated Gelles's impairment before her examination.

After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choosing." Id.

In September 2016, Dr. Galles responded to a form letter from the attorney for Biosolids and Auto-Owners opining the February 2015 injuries did not cause, materially aggravate, or substantially contribute to the development of Galles's cavovarus alignment of the right foot and ankle or to his current symptoms and need for any treatment. (Ex. 8, p. 82) Dr. Galles further agreed the incidents "merely contributed to a temporary aggravation of his preexisting condition," and during his examination, Gelles did not disclose his prior neurologic complaints involving his right foot and ankle. (Ex. 8, p. 82) Gelles disagreed with Dr. Galles's opinion, and sought an independent medical examination with Dr. Stoken in November 2016. Biosolids and Auto-Owners have not presented any evidence supporting the fee charged by Dr. Stoken is excessive

and not in accord with the industry standards. Gelles is entitled to recover Dr. Stoken's $1,700.00 examination fee under Iowa Code section 85.39.

VI. Cost of Dr. Stoken's Report and the Functional Capacity Report

Gelles seeks to recover the $2,000.00 fee for Dr. Stoken's report, and the $850.00 cost of the November 2016 functional capacity evaluation. Biosolids and Auto-Owners contend the invoice for the functional capacity evaluation is not itemized and Gelles is not entitled to recover the cost of the evaluation and the report. Rule 876 IAC 4.33 outlines the costs that can be taxed, as follows,

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The rule allows for the recovery of the cost of two reports. In LaGrange v. Nash Finch Co., File No. 5043316 (App. July 1, 2015), the Commissioner declined to award the cost of a functional capacity evaluation and a vocational evaluation because only the cost of the reports can be taxed, and the costs were not itemized. The functional capacity evaluation bill, set forth in Exhibit 3, page 50 is not itemized, and the report does not indicate the number of hours the physical therapist spent evaluating Gelles and preparing the report. Under LaGrange, Gelles is not entitled to recover the cost of the functional capacity evaluation.

Gelles presented an itemized bill from Dr. Stoken identifying the cost of the examination and the report, in compliance with the rule 876 Iowa Administrative code 4.33, and Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-47 (Iowa 2015). Gelles is entitled to recover the $2,000.00 cost of Dr. Stoken's report.

ORDER

IT IS THEREFORE ORDERED, that:

The claimant shall take nothing with respect to File Numbers 5056194 and 5056195.

With respect to File Number 5056091, the defendants shall pay the claimant two hundred (200) weeks of permanent partial disability benefits at the rate of six hundred seventy-seven and 63/100 dollars ($677.63), commencing on November 16, 2016.

Defendants shall pay accrued benefits in a lump sum, with interest on all accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendants are entitled to a credit for benefits previously paid.

Defendants shall reimburse the claimant three thousand seven hundred and 00/100 dollars ($3,700.00) cost of Dr. Stoken's examination and report.

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

Signed and filed this 15th day of March, 2017.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

John P. Dougherty
Attorney at Law
4090 Westown Pkwy., Ste. E
West Des Moines, IA 50266
Johndougherty3@me.com

Matthew R. Phillips
Attorney at Law
801 Grand Ave., Ste. 3700
Des Moines, IA 50309-8004
Phillips.matthew@bradshawlaw.com

HLP/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.