BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD R. TURNER, Claimant, vs. NCI BUILDING SYSTEMS, INC., Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 1652235.01 ARBITRATION DECISION Head Note Nos.: 1803, 1803.1, 2502 2907

STATEMENT OF THE CASE

Claimant, Donald Turner, filed a petition in arbitration for workers' compensation benefits against NCI Building Systems, Inc., as employer, and Liberty Mutual Insurance Company, as insurance carrier. This case came before the undersigned for an arbitration hearing on May 11, 2021. This case proceeded to a live video hearing via CourtCall. The hearing proceeded without significant difficulties.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into various stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 3, Claimant's Exhibits 1 through 8, and Defendants' Exhibits A through C, and E through N. Claimant testified on his own behalf. Defendants called Michael Flannagan to testify. The evidentiary record closed at the conclusion of the arbitration hearing. All parties filed their post-hearing briefs on August 16, 2021, at which time the case was deemed fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The nature of claimant's permanent disability and specifically whether the injury is limited to a scheduled member injury or involves permanent injuries to multiple body parts and claimant's mental health such that the claim would be compensated with industrial disability;

2. The extent of claimant's entitlement to permanent disability benefits, including whether claimant is permanently and totally disabled;

3. Whether claimant is entitled to reimbursement to some or all of his independent medical evaluation fee pursuant to Iowa Code section 85.39;

4. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13, and, if so, how much; and

5. Whether costs should be assessed against either party.

FINDINGS OF FACT

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

Donald Turner, claimant, was 57 years of age on the date of the evidentiary hearing. (Hearing Transcript, page 19) Mr. Turner is a high school graduate with some post-secondary education and training. Mr. Turner attended Upper Iowa University for one semester. (Exhibit L, Deposition pages 7-8) After leaving Upper Iowa University, Mr. Turner joined the armed forces. He admirably served as a medic in the National Guard from 1982 to 1986. (Ex. L, Depo. p. 9) Then, in 1999, Mr. Turner participated in an extensive maintenance training program as part of his employment with Tyson Foods. (Ex. L, Depo. p. 9) He has primarily worked as a mechanic ever since.

After working as a mechanic at Tyson Foods and Helena Chemical Plant, Mr. Turner applied for and received Social Security Disability benefits from 2010 to 2016 for his necrotizing pancreatitis. (Ex. L, Depo. pp. 21-22) After undergoing multiple surgeries, Mr. Turner was released to return to work in 2016. (See Ex. L, Depo. p. 22) Mr. Turner subsequently accepted a maintenance position with Heinz, where he worked for approximately one year before moving to Anamosa, Iowa and applying for a position with the defendant employer. (Ex. L, Depo. pp. 23-24)

Mr. Turner began his employment with NCI Building Systems (NCI) in November 2017. (Hr. Tr., p. 28) He was brought on as a full-time maintenance technician. (Hr. Tr., p. 21) Initially, Mr. Turner worked first shift; however, he eventually transitioned into a hybrid shift, where he spent time working on both the first and second shift. (Hr. Tr., pp. 25-27) Claimant returned to work for the defendant employer approximately 11 months after his stipulated work injury. He last worked for the defendant employer on September 21, 2020. (Ex. J; Hr. Tr., p. 93)

Mr. Turner sustained a stipulated injury that arose out of and in the course of his employment with NCI on August 1, 2018. (Hearing Report) On the date of injury, Mr. Turner was tasked with greasing the hub of a crane. (See Hr. Tr., p. 28) He utilized a scissor lift to complete the assignment as the hub was located approximately 30 feet off the ground. In the process of greasing the hub, the crane moved and knocked over the scissor lift Mr. Turner was using. Mr. Turner fell to the ground as a result. (See Hr. Tr., pp. 28-30) He does not remember how he landed, only that he was in a significant amount of pain. (Ex. L, Depo. pp. 30-31)

Mr. Turner was transported to a local hospital where x-rays revealed a vertebral compression fracture, multiple rib fractures, a mildly displaced right scapular fracture, a fractured right tibia, and multiple fractures in the right foot and ankle. (See Joint Exhibit 1, page 7) Once his condition stabilized, Mr. Turner was transported to the University of Iowa Hospitals and Clinics main campus via helicopter. (See JE1, p. 7) Upon arrival, Mr. Turner was intubated secondary to respiratory failure and bilateral pneumothoraces. (See JE2, p. 34)

On August 3, 2018, Matthew Karam, M.D., performed a multiplanar external fixation of the right tibial plafond fracture and a limited open reduction internal fixation of the distal tibial fracture. (JE2, p. 29) Claimant was extubated and transferred out of the intensive care unit on August 15, 2018. (See JE2, p. 34) Dr. Karam recommended inpatient rehabilitation services; however, the same was not immediately approved by the defendant insurer. Claimant was eventually discharged on August 22, 2018. (JE2, p. 22) In total, claimant was hospitalized for 22 days.

Claimant returned to UIHC's neurosurgery center for a six-week follow-up appointment on September 17, 2018. (JE2, p. 38) Claimant denied any significant upper back pain or neurologic symptoms. (Id.) Diagnostic imaging of the thoracic spine revealed appropriate alignment of the thoracic spine without any significant kyphosis. (Id.) Yasunori Nagahama, M.D., opined claimant could advance activity as tolerated from a neurosurgical standpoint. (JE2, p. 39)

On October 1, 2018, claimant followed up on his multiple rib fractures with Lauren Allan, D.O. (JE2, p. 40) At the appointment, claimant reported "absolutely" no problems with his rib fractures. (Id.) After conducting a physical examination of Mr. Turner, Dr. Allan opined there was no longer a need for any planned follow-up appointments and deferred claimant's return to work status to Dr. Karam. (JE2, p. 41)

While it is evident claimant was seeing improvement in his upper body conditions, the same cannot be said of his lower body conditions. On October 23, 2018, claimant reported significant pain as a result of his right lower extremity external fixator. (JE2, pp. 42-43) Diagnostic imaging of the right tib-fib and ankle revealed incomplete bony healing of the pilon fracture. (See JE2, p. 43) As such, Dr. Karam recommended and performed a removal of the external fixator. (JE3, p. 43) Claimant was placed into a short leg cast and was instructed to remain non-weight bearing on his right lower extremity. (Id.) Claimant transitioned into a walking boot eight weeks later. (JE2, p. 47)

After reporting left shoulder pain in December 2018, Dr. Karam ordered an MRI and referred claimant to Brendan Patterson, M.D., for further evaluation. (JE2, pp. 47, 53) Claimant presented for an initial evaluation with Dr. Patterson on February 27, 2019, reporting weakness and limited range of motion. (JE2, p. 54) Dr. Patterson assessed claimant with adhesive capsulitis and opined his condition likely resulted from the work injury or stemmed from a lack of motion after the injury. (JE2, p. 56) Dr. Patterson recommended and performed a glenohumeral steroid injection. (Id.)

Dr. Karam placed Mr. Turner at maximum medical improvement and released him to full-duty work, without restrictions from a lower extremities perspective, on July 2, 2019. (JE2, p. 68) He assigned 31 percent lower extremity impairment for mild loss of ankle plantar flexion, ankle extension, and osteoarthritis. (JE2, p. 69) The July 2, 2019, medical record provides that claimant would likely benefit from inserts, bracing, splinting, and possible fusion of the right ankle in the future. (Id.) At hearing, Mr. Turner testified that he had to advocate for a release because Dr. Karam did not want to release him to full duty work. (Hr. Tr., p. 37)

The next day, Mr. Turner presented to Dr. Patterson for an updated evaluation of his left shoulder. (JE2, p. 70) Claimant reported occasional pain (2/10) with overhead activity, but noted his symptoms were well controlled with Tylenol. (Id.) He denied numbness and tingling in the left arm and hand. (Id.) On examination, claimant demonstrated marked improvement in his range of motion. (JE2, p. 71) Dr. Patterson considered claimant to have excellent range of motion. (JE2, p. 72) The medical record provides that claimant had recently completed physical therapy, where he demonstrated the ability to lift up to 70 pounds. (JE2, p. 70) Claimant told. Dr. Patterson that he felt as though he could return to work without restrictions. (JE2, p. 72)

Dr. Patterson placed claimant at maximum medical improvement and released him to work without restrictions from a left shoulder perspective on July 3, 2019. (Id.) Dr. Patterson assigned 9 percent upper extremity impairment, or 5 percent whole person impairment, for loss of flexion, abduction, and internal rotation. (Id.)

Mr. Turner returned to his maintenance technician job with the defendant employer on July 8, 2019. Claimant returned to his normal job and received his normal earnings. (See Ex. L, Depo. pp. 41-42) Mr. Turner asserts that he was not able to perform all of his previous job duties. For instance, he testified that overhead lifting and pushing his cart was difficult, but he was still able to do it. (Hr. Tr., p. 38; Ex. L, Depo. p. 42) Mr. Turner also experienced constant pain in his feet after returning to work. (Hr. Tr., p. 41) He testified it became harder and harder to go to work every day. (Ex. L, Depo. p. 43)

Michael Flannagan, claimant's former supervisor, testified at the evidentiary hearing. According to Mr. Flannagan, claimant "more or less" handled his normal job duties when he returned to work. (See Hr. Tr., p. 89) Mr. Flannagan admitted he initially limited or restricted claimant from working in the air. (Hr. Tr., p. 99) Mr. Flannagan testified he did not notice a drop off in the quality of claimant's work product; however,

he did notice that it took claimant longer to move about the plant. (Hr. Tr., p. 91) Claimant's injuries did not cause him to miss any additional work after he returned in July, 2019. (Hr. Tr., p. 42)

On November 5, 2019, Mr. Turner returned to Dr. Karam with complaints of continued pain in the left heel and right ankle. (JE2, p. 76) Diagnostic imaging of the left heel revealed stable alignment of calcaneus fracture which appeared to be healed. Imaging of the right ankle revealed stable alignment and hardware in a stable position. The films also revealed moderate degenerative changes at the ankle joint. (See JE2, p. 78) Dr. Karam opined for the second time that Mr. Turner may require an ankle fusion in the future given the post-traumatic arthritis in the right ankle. (JE2, p. 78)

Following the November 5, 2019, appointment, Dr. Karam increased claimant's impairment rating to 38 percent lower extremity impairment, or 15 percent whole person impairment, for the right lower leg injury. (JE2, p. 78) In the same medical record, Dr. Karam assigned zero percent lower extremity impairment for the left calcaneus fracture. (Id.)

According to the medical records in evidence, Mr. Turner did not present for any additional medical treatment between November 6, 2019, and November 2, 2020. (See JE1-JE3)

In January 2020, the defendant employer offered claimant the opportunity to take a voluntary layoff or furlough. (See Hr. Tr., p. 44) Claimant accepted the offer and was taken off work until March 2020. (See Hr. Tr., p. 44) Unfortunately, Mr. Turner's return to work in March 2020 was short-lived as he was furloughed on April 17, 2020, due to the COVID-19 pandemic. (Ex. I; Hr. Tr., p. 44) He was subsequently terminated on September 21, 2020, as part of a downsizing effort by NCI. (Ex. J; Hr. Tr., p. 93)

Mr. Turner returned to Dr. Karam for a follow-up appointment on November 3, 2020. (JE2, p. 74) Mr. Turner reported significant discomfort on the plantar aspect of both feet and, for the first time, some paresthesias and weakness in his right upper extremity. (Id.) Defendants assert the timing of claimant's increased and new complaints is questionable. In this regard, defendants point out that claimant last physically worked for the defendant employer in April 2020, and his employment was terminated in September 2020.

On examination, Mr. Turner exhibited decreased sensation in the ulnar nerve distribution. (JE2, p. 75) Diagnostic imaging revealed healing fractures and no significant interval complications. (Id.) Dr. Karam noted that Mr. Turner was "quite down and demoralized" as a result of being released from work. (JE2, p. 74) Mr. Turner reported the significant discomfort he was experiencing affected his quality of life. (Id.) Given the magnitude of claimant's injuries and his presentation, Dr. Karam prescribed Celebrex for anti-inflammatory relief, wrote a referral for pain management, and ordered EMG and NCV studies "with the possible follow-up in [the] brachial plexus clinic to evaluate." (JE2, p. 75)

Pain management specialist Justin Wikle, M.D., conducted an initial evaluation of Mr. Turner on November 18, 2020. (JE2, p. 80) Given the various locations and nociceptive nature of claimant's pain, Dr. Wikle was not optimistic any procedural interventions would be helpful to Mr. Turner for any meaningful amount of time. (JE2, p. 85) Dr. Wikle opined Mr. Turner's pain is likely chronic and his goal will be to decrease said pain as much as possible. Since Mr. Turner's pain was affecting his mood, Dr. Wikle prescribed Cymbalta and recommended he see a clinical pain psychologist. (Id.; JE2, p. 86) Defendants did not immediately approve Dr. Wikle's recommendations. (See JE2, p. 96)

Dr. Wikle's medical record from the November 18, 2020, appointment contains a number of interesting notes. For instance, Mr. Turner relayed that he had been experiencing symptoms in his right upper extremity since March 2020. (JE2, p. 81) According to Mr. Turner, the symptoms first presented as "spots" of numbness in the right arm. Then, in approximately August 2020, he began experiencing constant numbness in his 4th and 5th digits. (Id.) He further reported that he has occasionally experienced sporadic episodes of entire right arm, right lateral neck, and right lateral face numbness since the date of injury. (JE2, p. 81) Lastly, Mr. Turner told Dr. Wikle that he was terminated by the defendant employer because he was not able to complete his job duties. (Id.) The evidentiary record does not support Mr. Turner's statements.

Dr. Karam restricted Mr. Turner to sedentary work on December 1, 2020. (JE2, p. 88)

An MRI of claimant's cervical spine, dated December 7, 2020, revealed multi-level degenerative disc disease with both central canal stenosis and significant neuroforaminal stenosis at multiple levels. (JE2, pp. 91-92; see JE2, p. 94) According to Dr. Wikle, the February 2021 EMG of Mr. Turner's right upper extremity revealed possible diabetic peripheral neuropathy. (JE2, p. 102)

At hearing, Mr. Turner testified to his current symptoms and functional abilities. His feet – right worse than left – continue to be his greatest concern. (Hr. Tr., p. 47) He estimated a constant pain level of 2-3/10 that increases with activity. (Hr. Tr., p. 48) With respect to his bilateral shoulders, claimant testified to issues with overhead work, pushing, and pulling. He does not experience any issues while sitting. (Hr. Tr., pp. 50-51) As to his thoracic spine, claimant testified that he experiences a tightness in his muscles with activity. (Hr. Tr., p. 51) Claimant also experiences pain or discomfort in his ribs depending on his sleep position. (Id.)

I was able to observe Mr. Turner at the evidentiary hearing by electronic means. Claimant's presentation was generally consistent with the medical records in evidence. I did not observe any cognitive deficits or delay when claimant was responding to questions.

In total, four physicians have offered opinions as to claimant's permanent impairment.

Dr. Karam, claimant's authorized treating physician, placed claimant at maximum medical improvement and released him to full-duty work, without restrictions from a lower extremity standpoint, on July 2, 2019. (JE2, p. 68) He ultimately assigned 38 percent lower extremity impairment, or 15 percent whole person impairment, for the right lower leg injury. (JE2, p. 78) Dr. Karam assigned zero percent lower extremity impairment for the left calcaneus fracture. (Id.)

Dr. Patterson placed claimant at maximum medical improvement and released him to work without restrictions from a left shoulder perspective on July 3, 2019. (Id.) Dr. Patterson assigned 9 percent upper extremity impairment, or 5 percent whole person impairment, for loss of flexion, abduction, and internal rotation. (Id.)

Mr. Turner sought an independent medical examination with Mark Taylor, M.D. (Ex. 1) The examination occurred on December 3, 2020. (Id.) Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Taylor assigned 20 percent right lower extremity impairment due to arthritis of the ankle joint, 20 percent right lower extremity impairment for the intra-articular fracture, and 6 percent right lower extremity impairment for the dysesthesias of the medial and lateral plantar nerves. (Ex. 1, p. 14) These three values combine for a total of 40 percent right lower extremity impairment, or 16 percent whole person impairment. (Id.) Dr. Taylor also assigned 5 percent left lower extremity impairment, or 2 percent whole person impairment, for decreased inversion and dysesthesias of the medial and lateral plantar nerves. (Id.)

Dr. Taylor assigned 9 percent left upper extremity impairment, or 5 percent whole person impairment, for the loss of motion in claimant's left shoulder. (Ex. 1, p. 15) Dr. Taylor similarly assigned 6 percent right upper extremity impairment, or 4 percent whole person impairment, for loss of motion in claimant's right shoulder. (Id.) Lastly, Dr. Taylor assigned 5 percent whole person impairment for the compression fracture/deformity at T5. (Id.)

One month later, Mr. Turner submitted to an independent medical examination with Joseph Chen, M.D., on January 5, 2021. (Ex. C, p. 7) Dr. Chen could not causally relate claimant's right hand, elbow, neck, or low back complaints to the August 1, 2018, work injury. (Ex. C, p. 14) He explained that the absence of symptoms from the time of his work incident in August 2018 and ability to perform his full work duties until he was furloughed indicates that his symptoms are unrelated to his August 2018 work incident. (Id.) Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Chen attributed 29 percent right lower extremity impairment for claimant's ankle range of motion loss, 40 percent right lower extremity impairment due to post-traumatic osteoarthritis, 5 percent right lower extremity impairment due to medial and plantar nerve injuries, and 5 percent left lower extremity impairment due to medial and plantar nerve injuries. (Ex. C, pp. 22-23) Dr. Chen did not agree with Dr. Patterson's impairment rating for the left shoulder. Because claimant demonstrated normal range of

motion on examination, Dr. Chen did not assign an impairment rating to the left shoulder. In total, Dr. Chen assigned 26 percent whole person impairment as a result of claimant's injuries. (Ex. C, p. 23)

Defendants sought updated opinions from claimant's authorized treating physicians in January, 2021. (See Exs. A, B)

In a letter, dated January 5, 2021, defendants proposed several questions to Dr. Karam regarding claimant's treatment. (Ex. A, pp. 1-4) Dr. Karam responded to defendants' questions on January 19, 2021. (See Ex. A, p. 4) Essentially, Dr. Karam confirmed the medical treatment he provided, explained how claimant's right foot conditions in November 2020 could be causally related to the original work injury, and declined to address causation with respect to claimant's mental health complaints. (Ex. A, pp. 1-4)

Dr. Patterson responded to a similar questionnaire from defendants on January 20, 2021. (Ex. B, p. 5) Dr. Patterson opined that claimant did not express any complaints indicative of a brachial plexus injury during treatment. (Id.) However, Dr. Patterson noted that claimant did complain of transient numbness and tingling in both upper extremities, from the elbows to the hands, during his May 15, 2019, appointment. (Id.) Dr. Patterson opined that claimant's numbness and tingling could have some possible etiology from his cervical spine, "but as we were treating him for an isolated shoulder condition this was not directly evaluated in the context of our visits." (Id.) Dr. Patterson declined to address causation with respect to claimant's neck and brachial plexus issues. (Ex. B, p. 6)

Dr. Wikle also responded to defendants' request for updated opinions. Dr. Wikle disagreed with the assertion that claimant's right hand and arm symptoms likely stem from an ulnar nerve issue. (Ex. K, p. 45) Dr. Wikle opined it is possible claimant's symptoms are related to the ulnar nerve; however, the MRI of claimant's cervical spine revealed significant stenosis which could also be causing claimant's symptoms. (Id.) Dr. Wikle agreed that he is unable to comment on whether claimant is in need of any restrictions at this time. (Id.)

When comparing the impairment ratings offered, I note that Dr. Karam had the chance to evaluate claimant multiple times, including intra-operatively. Dr. Karam's updated impairment rating is consistent with claimant's reporting of increased symptoms following a return to full-duty work. Dr. Karam's impairment ratings are substantially similar to the impairment ratings of Dr. Taylor; however, Dr. Karam assigned zero percent impairment to the left lower extremity, while Dr. Taylor and Dr. Chen assigned 5 percent. Dr. Karam is the only medical expert to assign zero percent impairment to the left lower extremity.

With respect to claimant's lower extremities, I favor and accept the impairment ratings offered by Dr. Taylor. Unlike Dr. Karam, Dr. Taylor's impairment ratings specifically consider and address the significant pain over the plantar surface of

claimant's left foot. Dr. Chen reached the same conclusion as Dr. Taylor with respect to claimant's left foot, and claimant credibly testified that his left foot continues to cause him pain. (Ex. L, Depo. p. 46) Therefore, I find claimant proved 40 percent right lower extremity impairment and 5 percent left lower extremity impairment.

Dr. Patterson and Dr. Taylor agree on the permanent impairment sustained as a result of claimant's left shoulder injury. Dr. Chen declined to assign permanent impairment to the left shoulder as claimant demonstrated full range of motion on the date of his IME. At hearing, claimant credibly testified to ongoing pain in his left shoulder. He further testified to his limitations in lifting above shoulder level, as well as pushing and pulling with his left arm. Dr. Patterson noted claimant's symptoms were well-controlled with an injection. He also noted claimant's ability to lift up to 70 pounds during physical therapy. Nevertheless, Dr. Patterson ultimately assigned 9 percent impairment for the loss of motion claimant had sustained as a result of his work injury. (JE2, p. 72) I find Dr. Patterson's assessment to be reasonable and convincing. I similarly find Dr. Taylor's assessment reasonable and convincing. Therefore, I accept the 9 percent impairment rating offered by both Dr. Patterson and Dr. Taylor over the impairment rating of Dr. Chen.

Dr. Taylor is the only physician to assign permanent impairment to claimant's right shoulder and thoracic spine. Dr. Taylor bases his right shoulder impairment rating to a loss in glenohumeral range of motion. Dr. Taylor provides no opinion as to how claimant's loss of motion in the glenohumeral joint is related to the right scapular fracture. Dr. Taylor does not address the fact claimant did not present with complaints of pain in the right shoulder area until November 2020, or the results of claimant's update diagnostic imaging. For these reasons, I cannot accept Dr. Taylor's opinion with respect to right shoulder impairment. As such, I find claimant failed to carry his burden of proving permanent impairment to his right shoulder at this time.

The evidentiary record reveals little to no evidence that claimant sustained permanent disability as a result of his compression fracture at T5. That being said, claimant has proven he sustained a compression fracture at T5 on the date of injury, which was a new finding when compared to a 2010 thoracic x-ray. (See JE1, p. 12) Dr. Taylor opined that claimant's condition fell within DRE Thoracic Category II, and assigned 5 percent whole person impairment. The permanent impairment rating appears to be a result of the injury itself, not the result of any lingering effects of the same. According to Table 15-4 on page 389 of the AMA Guides, an individual can be assigned to DRE Category II if they sustain a compression fracture to the thoracic spine and the compression is less than 25 percent. Dr. Taylor's opinion is unrebutted in the evidentiary record. As such, I accept Dr. Taylor's impairment rating and his assessment of the same reasonable and convincing.

Using the Combined Values Chart found at page 604 of the AMA Guides, Fifth Edition, I find that the 16 percent whole person permanent impairment rating for the right lower extremity combines with the 2 percent whole person impairment rating for the left lower extremity and results in a combined rating equal to 18 percent of the whole

person. I further find that the 18 percent rating combines with the 5 percent whole person impairment rating for the left upper extremity and results in a combined rating equal to 22 percent of the whole person. I find that Mr. Turner proved a 22 percent permanent impairment of the whole person as a result of the injuries sustained on August 1, 2018.

With respect to permanent restrictions, Dr. Karam placed claimant at maximum medical improvement and released him to full-duty work, without restrictions from a lower extremity perspective on July 2, 2019. (JE2, p. 68) Claimant subsequently returned to his full-duty position; however, his supervisor allowed him to take short breaks whenever his feet were bothering him. (Hr. Tr., p. 89) As a Maintenance Team Leader, claimant was frequently required to walk, stand, sit, bend, and stoop. He was also required to frequently reach with his hands and arms, lift, and climb. (Ex. 5, p. 44)

Dr. Chen opined that claimant sustained severe orthopedic injuries that may limit his continued ability to perform rigorous physical activities as a maintenance mechanic. (Ex. C, p. 15) However, Dr. Chen also noted that claimant was able to perform his full work duties, without restrictions, between July 2019 and March 2020. Ultimately, Dr. Chen opined that claimant's personal or idiopathic factors would be the major contributing factors limiting his ability to work as a maintenance mechanic. (Id.)

Following his independent medical examination, Dr. Taylor recommended Mr. Turner have the ability to alternate sitting, standing, and walking as needed for comfort. He further recommended rare, and only partial squatting, rare to occasional use of stairs, and occasional bending and kneeling. (Ex. 1, p. 15) Dr. Taylor opined it is difficult to estimate claimant's lifting abilities. He explained, "He is likely a fairly strong individual, but in light of his ongoing pain over the glenohumeral areas, as well as his right upper extremity paresthesias and cramping, and coupled with his lower extremity issues, I would presently recommend a 30-pound lifting and carrying limit, preferably at or above knee level." (Ex. 1, p. 16)

There is evidence that claimant's functional abilities were significantly greater when his chronic pain was adequately addressed. Unfortunately, claimant has experienced delay in receiving pain management with a pain psychologist. He has also experienced delay in receiving pain medications such as Cymbalta and Hydrocodone. These delays have affected his functional abilities.

Dr. Taylor is the only physician to recommend specific permanent restrictions; however, Dr. Chen also expressed the opinion that claimant's severe orthopedic injuries may limit his continued ability to perform rigorous physical activities such as a maintenance mechanic. It is clear to the undersigned that claimant requires some form of permanent restrictions. Of the three opinions relating to permanent restrictions, I find the restrictions recommended by Dr. Taylor most accurately reflect claimant's current functional abilities; however, it appears at least some of the restrictions are tethered to conditions unrelated to the work injury. As such, I do not adopt any specific restrictions. I do, however, find that claimant likely requires some form of permanent restrictions.

Mr. Turner also asserts that he sustained a mental health injury as a sequela of his physical injuries. Defendants dispute causation with respect to claimant's mental health symptoms. Instead, they attribute claimant's symptoms to other social stressors and loss of employment.

Claimant's past medical history does not include a significant amount of mental health treatment. However, the evidentiary record reflects claimant was previously assessed with an anxiety disorder and an impulse control disorder on July 27, 2016. (See JE1, p. 20) Claimant has indicated that he sought therapy while he was going through a divorce several years prior to the work injury. (See JE2, p. 36) However, there is little evidence to suggest claimant was struggling with his mental health in the weeks, months, and years leading up to his work injury.

Shortly after the work injury, Mr. Turner's mental health was assessed by Benjamin Tallman, Ph.D. (See JE2, p. 36; see also Ex. 1, p. 7) Claimant presented to Dr. Tallman for a psychological evaluation of lifestyle, behavioral, cognitive, and affective factors of psychological health impacting his course of recovery following trauma. (JE2, p. 36) With respect to his past medical history, claimant denied prior psychiatric treatment and psychotherapy. (Id.) At the time of the evaluation, claimant reported that his mood was good and that he was seeing improvement in his sleep and energy levels. Claimant felt as though he was coping well with his current situation. (JE2, p. 37) He denied feeling depressed or anxious. (JE2, p. 36) Dr. Tallman ultimately opined that claimant's mood appeared to be predominantly stable with some mild mood fluctuations, including anxiety. (JE2, p. 37) Interestingly, despite what appears to be an unremarkable evaluation, Dr. Tallman assessed claimant with an adjustment disorder with anxiety and depressed mood. (Id.)

The evidentiary record reflects claimant did not report any mental health symptoms to any physicians between September 7, 2018, and November 2, 2020. Additionally, claimant did not testify to any mental health issues during his deposition on September 30, 2020. (Ex. L)

Despite not reporting any mental health issues between September 2018 and November 2020, claimant testified at hearing that he experienced issues with respect to depression and anxiety when he returned to work for the defendant employer. (Hr. Tr., p. 53)

Review of the evidentiary record reveals that Mr. Turner had several external stressors in his life during the Fall of 2020, including the loss of his job and resulting financial issues, his daughter's worsening health issues, and his daughter abruptly moving out of his home. At hearing, claimant testified that he became very depressed when he was terminated from his position. (Hr. Tr., p. 54) According to claimant, this was when he "really started feeling worthless." (Hr. Tr., p. 55) Shortly thereafter, claimant began reporting mental health issues to his treating physicians.

Dr. Karam's November 3, 2020, report provides, "Of note the patient is (sic) recently been released from work, he is quite down and demoralized and feels that he has (sic) having significant discomfort is affecting the quality of his life." (JE2, p. 74) The medical record goes on to state, "In general he was pretty down given the situations in his life although typically has demonstrated good coping mechanisms in the past." (JE2, p. 75)

Dr. Wikle's November 18, 2020, medical record provides "Mr. Donald R. Turner is a 56 y.o. male with [chronic kidney disease], [Type-II Diabetes], Anxiety seen in the Pain Clinic […]" (JE2, p. 80) After discussing the work injury, Dr. Wikle notes that claimant's mood has been effected by the pain and being let go by his employer. (Id.) Dr. Wikle diagnosed claimant with situational depression and prescribed Cymbalta in the hopes that it would help both claimant's pain and mood. (JE2, p. 85) Dr. Wikle also referred claimant to a pain psychologist. (Id.; see JE2, p. 93) ("We started him on Cymbalta and also put in a referral to our pain psychologist.")

An appointment with a pain psychologist was originally scheduled for December 23, 2020. Unfortunately, claimant was unable to obtain the Cymbalta prescription or schedule an evaluation with a pain psychologist as defendants denied causation for any alleged mental health symptoms. (See JE2, pp. 94, 96)

The January 19, 2021, medical record from Dr. Wikle provides:

> In addition we discussed pain psychology given the fact that he has significant emotional distress related to his injury would like him evaluated. We placed a referral for this last visit however Worker's Comp has not paid for the medications or the recommendations from last visit. At this time, it seems that his pain is significantly limiting his function.

(JE2, p. 96) Dr. Wikle's medical records routinely note that claimant's treatment plan for his chronic pain would require a multifactorial approach, including maximizing treatment of mood, reducing stressors, improving cardiovascular fitness, and cognitive-behavioral strategies. (Id.)

The referral to a pain psychologist and prescription for Cymbalta were eventually approved prior to claimant's April 22, 2021, appointment with Dr. Wikle. (See JE2, p. 103) It appears claimant discontinued his use of Cymbalta after only a few days due to personal reasons. (JE2, p. 103) Dr. Wikle subsequently prescribed Hydrocodone. (Id.) Claimant was scheduled to present to a pain psychologist on May 17, 2021, or six days after the evidentiary hearing. (See Hr. Tr., p. 11)

Several expert physicians weighed in on claimant's mental health allegations.

In a letter to defendants, Dr. Wikle agreed with the statement that his referral for a pain psychologist was not an opinion that claimant has a mental health disorder or that the same is connected to the work injury. (Ex. K, p. 45) Interestingly, Dr. Wikle was

then asked, "Your referral to the pain psychologist was merely for a session or two to teach Mr. Turner techniques for coping with pain?" Dr. Wikle answered affirmatively. (Id.) However, nowhere in Dr. Wikle's medical records does it provide or even imply that his referral to a pain psychologist was merely for a session or two so claimant could learn coping techniques. It would be difficult to infer such an opinion from Dr. Wikle's medical records. Moreover, Dr. Wikle is not a pain psychologist, and he would not be the one directing claimant's treatment plan with respect to pain psychology. His opinions in this regard are mere speculation.

Dr. Wikle's opinion makes an important distinction between mental health treatment and treatment with a pain psychologist for chronic pain. Claimant was referred to a pain psychologist to help him cope with his chronic pain. He was not referred to a pain psychologist for treatment regarding a mental health disorder. Such a referral was part of a multifactorial approach to address claimant's chronic pain. (See JE2, p. 96) I do not find such a referral establishes definitive proof of a mental health disorder.

Dr. Chen's report does not expressly address causation for claimant's mental health complaints; however, he opined psychotherapy for depression or anxiety under the workers' compensation system would not be medically necessary or lead to objective improvements in outcome. (Ex. C, p. 15) Dr. Chen believed claimant may benefit from a few sessions of pain coaching when he achieves more solid financial and personal stability. (Id.)

Dr. Patterson reported that Mr. Turner did not present with any complaints, symptoms, or findings that would indicate he was suffering from a mental health injury between March 13, 2019, and July 3, 2019. (Ex. B, p. 6)

As previously mentioned, Mr. Turner did not discuss his mental health issues at his September 30, 2020, deposition. He did, however, discuss his mental health issues at his January 22, 2021, deposition. At his January 22, 2021, deposition, claimant testified that his mental health issues, "really started after they let me go at work." (Ex. M, Depo. p. 13) Claimant expressed his belief that the employer used COVID-19 to push him out the door. (Ex. M, Depo. pp. 15-16) Claimant also discussed some of the concerns he was having with respect to his daughter. According to claimant, his daughter suffers from an autoimmune disorder. (Ex. M, Depo. p. 17) Claimant testified that his daughter was back on dialysis and needed a kidney transplant. Because claimant was not able to take care of his daughter as well as he could before his injury and termination, claimant's daughter moved to Des Moines, Iowa to live with her mother. Claimant testified that his daughter, "packed her bag one weekend and said she was going to stay with friends and never came home." (Ex. M, Depo. p. 20) Later in the deposition, claimant's counsel asked Mr. Turner whether he had experienced any psychological issues prior to his termination. In response, claimant detailed one instance in which he broke down and cried at work because of the pain he was experiencing in his feet and the fact that his daughter was in the hospital again. (Ex. M, Depo. pp. 27-28)

In support of his mental health claim, claimant obtained an independent psychiatric examination with psychiatrist Adam Woods, M.D. (Ex. 2, p. 26) The examination occurred on January 7, 2021, just over two months from when claimant first reported mental health issues. (Id.) As part of the examination, Dr. Woods administered two standardized exams in an attempt to provide objective data for the subjective process of mental health evaluation and diagnosis. (Ex. 2, p. 28) First, claimant was instructed to complete the PHQ-9 and GAD-7 exams based on how he was feeling on the date of his examination. For this round of testing, claimant's PHQ-9 score was 21/27, and his GAD-7 score was 10/21. (Id.) Then, claimant was instructed to complete the same exact exams based on how he believed he felt prior to the date of injury. For this second round of testing, claimant's PHQ-9 score was 3/27, and his GAD-7 score was 5/21. (Id.) Based on these results, Dr. Woods opined that claimant showed a significant change in his pre and post-injury testing with regards to both depression and anxiety-based symptoms. (Id.)

Ultimately, Dr. Woods diagnosed claimant with an adjustment disorder and opined that claimant's work injury and resulting chronic pain constitute substantial contributing factors in bringing about said adjustment disorder. (Ex. 2, p. 30) Dr. Woods explained,

> This is defined by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) as "the development of emotional or behavioral symptoms in response to an identifiable stressor(s) occurring within 3 months of the onset of the stressor(s)."

(Ex. 2, p. 29) Dr. Woods goes on to opine that claimant's case is "classic" for Adjustment Disorder and "could be used in a medical textbook as an ideal example." (Ex. 2, p. 29) It is difficult to find such an opinion convincing given the very definition of Adjustment Disorder used by Dr. Woods requires the development of emotional or behavioral symptoms within three months of the onset of the stressor. As previously noted, claimant did not report any mental health symptoms until November 2020.

Dr. Woods opined that claimant's adjustment disorder seriously impacts his employability and ability to attend work. (Ex. 2, p. 32) He concluded claimant is not capable of full-time, gainful employment at this time. (Ex. 2, p. 33) He opined that claimant's psychiatric symptoms are profound in nature and wholly debilitating. (Id.) He also opined claimant's mental health symptoms are, "practically paralyzing." (Ex. 2, p. 29)

With respect to permanency, Dr. Woods opined the AMA Guides cannot determine an impairment rating at this time as claimant's condition is currently untreated. (Ex. 2, p. 32) With respect to additional medical treatment, Dr. Woods recommended Cognitive Behavioral Therapy, psychiatric medication management, and enrollment in a Mindfulness-Based Stress Reduction course. (Ex. 2, p. 31) Dr. Woods opined that as long as claimant's stressors remain, so, too, does the Adjustment Disorder. (Id.)

Defendants obtained a competing psychiatric evaluation, performed by Scott Jennisch, M.D., a board-certified psychiatrist. (Ex. N) The examination occurred April 16, 2021. (Ex. N, p. 49)

When discussing the history of his mental health condition with Dr. Jennisch, claimant relayed that he was getting along relatively well immediately after his injury, during physical rehabilitation, and during the 11 months in which he returned to full-time work, without restrictions. (Ex. N, p. 56) He further provided that his mental health remained stable during his COVID-19 furlough and he was able to maintain financial stability during this period thanks to unemployment benefits. (Id.) Claimant identified losing his job in the Fall of 2020 as the event that significantly impacted his emotional state. (Id.) Dr. Jennisch ultimately concluded that losing his job was a blow to claimant's self-esteem, resulted in social isolation, forced him to move due to financial constraints, and led to the loss of insurance. (Id.) The report also discusses claimant's daughter's decision to abruptly move out of claimant's home, without notice, in the Fall of 2020, and how the move impacted claimant's mental health. (Id.) Claimant told Dr. Jennisch that his job and his daughter were the two things that kept him motivated in life. (Id.)

At the conclusion of his evaluation, Dr. Jennisch summarized his clinical impression:

> After his injury in August 2018, there were understandable challenges dealing with the injury, recovery, workers' compensation, pain, and concerns about issues with his daughter's health; however, she was living with him and he was able to return to work for nearly a year. In that setting he confirmed that he was not experiencing a psychiatric disorder or sequela. The timeframe in which his daughter abruptly moved away while experiencing an even greater level of concern about her health coincides with the downsizing of his position at work which is what led to the onset of psychiatric symptoms and problems identified at this evaluation.

(Ex. N, p. 58)

Ultimately, Dr. Jennisch opined that Mr. Turner endorses symptoms consistent with an adjustment disorder with a depressive and anxious component. (Ex. N, p. 62) However, Dr. Jennisch did not causally relate the same to the August, 2018 work injury. (Id.) He does not believe psychiatric treatment is indicated based on the work injury; however, he opined that claimant may find benefit in counseling services related to the stress of unemployment and issues related to family dynamic and his daughter's health. (Ex. N, p. 64) Dr. Jennisch acknowledged that chronic pain is one subject matter that could be addressed through counseling services; however, he noted that claimant was coping with this subject matter well until the introduction of external stressors which he believes exacerbated claimant's pain condition. (Id.)

Dr. Jennisch disagreed with Dr. Woods' opinion that claimant is dealing with a severe and disabling psychiatric condition. He noted that Dr. Woods identified symptoms that he believes would interfere with claimant's employability, however, he did not provide examples in day-to-day functioning that suggest Mr. Turner is experiencing a severe psychiatric disorder. (Ex. N, p. 65) Dr. Jennisch opined claimant is not restricted from activities due to his psychiatric condition. (Id.) Dr. Jennisch's report highlights that claimant attended all of his medical appointments, went to work routinely for 11 months, and has not described any significant cognitive deficits. Dr. Jennisch further critiqued Dr. Woods' opinion that claimant's psychiatric condition would exist as long as a stressor is present. Dr. Jennisch considered such an opinion to be overly simplistic as people can improve and adapt to chronic health conditions. (Id.) In this regard, Dr. Jennisch opined that Mr. Turner's condition is not permanent. (Id.)

The evidentiary record was left open following the arbitration hearing for receipt of a rebuttal report from Dr. Woods. (Hr. Tr., p. 16) Dr. Woods' rebuttal report is dated June 3, 2021. (Ex. 9, p. 74) In the report, Dr. Woods addressed Dr. Jennisch's causation opinion and his comments on Dr. Woods' original report. (Ex. 9, pp. 74-78) Throughout the rebuttal report, Dr. Woods misinterprets several of Dr. Jennisch's opinions. Additionally, Dr. Woods commits several logical fallacies, speaks in absolutes, and makes a number of generalizations, all of which diminish his credibility. I do not find the arguments made by Dr. Woods in his rebuttal report to be convincing. The report strongly advocates for claimant through argument, but offers little in terms of actual analysis.

When the opinions of the mental health professionals are considered, I note evidence that could be relied upon to support the opinions of Dr. Woods. For instance, regardless of causation, the mental health professionals in this case agree that claimant has an adjustment disorder, and there is little to no evidence that claimant was experiencing mental health issues prior to the August 2018 fall at work.

Yet, I have a difficult time accepting the opinions of Dr. Woods. Neither of his reports sufficiently explain how the work injury itself was a substantial contributing factor in bringing about claimant's mental health condition. Similarly, neither report adequately addresses claimant's lack of symptoms between the date of injury and November 2020, or the external stressors facing claimant when his symptoms ultimately appeared. Based on the records and opinions of Dr. Woods, it is difficult to ascertain what information or medical history he was privy to. When asked to address the assertion that claimant did not experience mental health issues prior to his termination, Dr. Woods first pointed to Dr. Tallman's psychological evaluation, which took place shortly after the work injury as part of his inpatient rehabilitation. As previously discussed, claimant did not present to Dr. Tallman with severe mental health symptoms. Dr. Tallman opined claimant's mood was predominantly stable, his then-current coping was appropriate, and his cognitive functioning was grossly intact. (JE2, p. 37) Moreover, claimant did not seek any additional mental health treatment following his evaluation with Dr. Tallman.

Dr. Woods asserts that the reason claimant's medical records do not mention any mental health issues between the date of injury and November 2020, is because claimant's treating physicians did not ask about them. (Ex. 9, p. 76) Dr. Woods' statement is purely speculative and goes against claimant's own testimony that his mental health symptoms did not start until after he was terminated from employment with the defendant employer. (See Ex. M, Depo. p. 13)

Moreover, there is evidence that claimant's mental health was assessed just before he lost his job. On June 2, 2020, Brady Hunt, PA-C administered GAD-7 and PHQ-9 exams on claimant. These are the same examination questions claimant addressed during Dr. Woods' psychiatric evaluation. (See Ex. 2, p. 28) Out of the 16 possible indicators, claimant only marked that he was, "Becoming easily annoyed/irritable" and "Trouble falling or staying asleep, or sleeping too much." (JE1, p. 16) Claimant did not indicate that he was "Feeling nervous/anxious/on edge," "down, depressed or hopeless," or "Feeling bad about yourself – or that you are a failure or have let yourself or your family down." (Id.) Claimant scored 3/21 on the GAD-7 and 3/27 on the PHQ-9. (Id.) When asked how difficult his problems have made it for him to "do your work, take care of things at home, or get along with other people[,]" claimant responded, "Not difficult at all." (Id.) Dr. Woods did not address the June 2, 2020, medical record in either report.

In comparison, Dr. Jennisch reviewed and summarized all relevant medical records and both deposition transcripts. (Ex. N, pp. 2-7) Dr. Jennisch's report details external issues and stressors as being much more significant to Mr. Turner than his physical injuries over the course of his medical treatment and recovery. In this regard, his report is in line with the evidentiary record as a whole.

When I compare the respective credentials of the competing experts, I note that Dr. Jennisch is board certified, while Dr. Woods is board eligible. I also note that Dr. Jennisch has over 20 years of clinical experience while Dr. Woods has only been practicing since 2014. (Ex. 2, p. 34) Both individuals are more than qualified to diagnose mental health issues and offer causation opinions regarding the same. While the difference is not substantial, I find that Dr. Jennisch's experience and credentials are superior to those of Dr. Woods.

As I weigh the competing medical evidence with respect to claimant's alleged mental health condition, I find the opinions of Dr. Jennisch to be the most convincing and credible. For these reasons, I accept the causation opinion of Dr. Jennisch over the causation opinion of Dr. Woods. While it is clear claimant's chronic pain is elevated by his mental health condition, and, in a cyclical way contributes to the mental health condition, claimant has failed to prove the work injury and resulting physical conditions caused, or substantially contributed to, the presentation of the mental health condition. As thoroughly discussed in Dr. Jennisch's report, and supported by the evidentiary record as a whole, claimant's mental health condition was stable following his work injury, despite his ongoing physical symptoms. Claimant did not develop persistent

mental health issues until his daughter's health issues increased and he was terminated from employment due to downsizing related to COVID-19.

The undersigned's finding that claimant failed to prove causation for his mental health issues does not impact claimant's need for pain management through a pain psychologist. As previously noted, treatment with a pain psychologist for coping with chronic pain does not necessarily equate to mental health treatment. Despite their differing views on the extent of treatment needed, Drs. Wikle, Jennisch, Woods, and Chen all agree claimant could benefit from the services of a pain psychologist. (JE2, p. 86; Ex. N, p. 64; Ex. 2, p. 31; Ex. C, p. 15)

After significant delay, it appears defendants authorized treatment with a pain psychologist. At hearing, claimant requested that the evidentiary record be left open for receipt of the medical records from claimant's initial evaluation with Beth Dinoff, Ph.D., a pain psychologist from the University of Iowa Hospitals and Clinics. (Hr. Tr., p. 11) The initial evaluation was scheduled to take place on May 17, 2021, six days after the evidentiary hearing. The undersigned denied claimant's request, noting the evidentiary record reveals Dr. Wikle, an authorized treating physician, recommended claimant receive pain management through a pain psychologist, and defendants had authorized the same. Liability for the requested treatment had clearly been established.

Following the evidentiary hearing, claimant filed a renewed motion to admit evidence, or, in the alternative, made an offer of proof of these records.

To the extent claimant intended to use the medical notes from the May 17, 2021, appointment to establish causation for a mental health sequela, the undersigned determined that the medical notes from the May 17, 2021, appointment would amount to cumulative evidence. Both parties submitted independent psychiatric evaluations, and the evidentiary record was left open so claimant could obtain a rebuttal report from Dr. Woods. These evaluations were performed by psychiatrists who reviewed claimant's medical records, conducted psychiatric evaluations, and were specifically tasked with addressing causation for claimant's alleged psychiatric condition. In comparison, Dr. Wikle referred claimant to Dr. Dinoff, a pain psychologist, "for the psychosocial aspect of pain care through coping skills, relaxation strategies, cognitive group therapy etc." (JE2, p. 86) At the time of hearing, there was no indication that the initial evaluation with Dr. Dinoff was to address causation for the alleged mental health condition.

Moreover, the initial evaluation with Dr. Dinoff had not taken place prior to the evidentiary hearing. Leaving the record open to introduce the initial medical notes and opinions of a new expert would almost certainly result in prejudice to one of the parties and rectifying any such prejudice would likely require leaving the record open for additional time.

For the above reasons, claimant's renewed motion to admit the May 17, 2021, medical record into evidence is denied. The medical record will remain in claimant's file as an offer of proof.

Claimant desires ongoing treatment with a pain psychologist to address his chronic pain. The undersigned notes that any assertion by defendants that the May 17, 2021, appointment was for a one-time evaluation, or that such an assertion could even be made prior to the evaluation, strains credulity. Such an assertion is pure speculation on the part of defendants. To the extent Dr. Wikle believes his referral was, "merely for a session or two" is also purely speculative and such an opinion is entitled to no weight. Dr. Wikle is not a pain psychologist, and he would not be directing claimant's treatment plan with respect to pain psychology. Defendants shall authorize the recommendations and treatment plans developed by Dr. Dinoff, claimant's authorized treating pain psychologist.

Defendants have presented evidence to call Mr. Turner's motivation into question. To make a finding of permanent total disability, it is helpful for this agency to have evidence that a claimant has made an actual, good faith work search. Mr. Turner has not worked since September, 2020. (Hr. Tr., p. 45) He has not looked for or submitted applications for alternative employment. (Hr. Tr., pp. 45-46) He has not attempted to return to the active workforce. He has, however, applied for Social Security Disability benefits. (Hr. Tr., p. 46) Neither party secured the opinions of a vocational expert. Claimant did not introduce substantial evidence to show that he has no reasonable prospect of steady employment.

Claimant sustained permanent injuries to the right leg, left foot, left shoulder, and thoracic spine as a result of the August 1, 2018, work injury. Claimant is experiencing chronic pain in his bilateral feet and left shoulder. Claimant asserts his pain fluctuates between 2 and 10 on a 10-point scale, depending on his activity level and the use of medication. (Hr. Tr., p. 48) There is no evidence that claimant made a genuine attempt to return to the workforce after being terminated by the defendant employer in September 2020. Claimant has not sought any alternative employment. He has not presented for a functional capacity evaluation. Therefore, there is limited information as to what positions within the labor market he could perform.

Claimant sustained significant disability as a result of the August 1, 2018, work injury. That being said, the evidentiary record is not well developed as it pertains to the assertion that claimant is permanently and totally disabled. According to the greater weight of the medical evidence, I find claimant is not permanently and totally disabled.

Considering Mr. Turner's age, educational background, employment history, functional abilities and limitations, permanent impairment ratings, his lack of motivation to return to the work force, as well as all other industrial disability factors identified by the Iowa Supreme Court, I find that Mr. Turner has proven he sustained a 40 percent loss of future earning capacity as a result of the August 1, 2018, work injury.

The last issue to be decided is whether defendants should be assessed with penalties. Mr. Turner asserts penalty benefits are appropriate due to defendants' delay in the payment of PPD benefits between October 15, 2019, and January 3, 2020. (See Ex. 7) Claimant has established a delay in benefits. Defendants offer no excuse, explanation, or basis for the delay or denial of benefits. Instead, defendants simply assert they should not be penalized for something they did not know about. Such a response is baffling considering the fact it is quite literally the defendant insurer's job to know the status of an injured worker's benefit payments. Defendants' delay or denial of benefits is found to be unreasonable.

Claimant was successful in his workers' compensation claim. Costs will be addressed in the Conclusions of Law section.

CONCLUSIONS OF LAW

The first issue to be addressed is whether Mr. Turner carried his burden of proving his permanent disability is an industrial disability.

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).

In their responses to claimant's Request for Admissions, defendants admitted that claimant suffered injuries to his right leg, left foot, and left shoulder on August 1, 2018. (Ex. 3, pp. 36-37) Defendants also admitted that claimant sustained industrial disability as a result of his August 1, 2018, work injury. (Ex. 3, p. 37) In their post-hearing brief, defendants assert that evidence submitted at the time of trial now indicates that claimant's disability does not extend into his body as a whole. Thus,

defendants moved to amend their previous response to claimant's Request for Admissions to conform to proof.

Defendants argue claimant's permanent disability is confined to the right lower extremity. Having found claimant carried his burden of proving permanent impairment in the bilateral lower extremities, left shoulder, and thoracic spine, I reject defendants' argument. Given this finding, I further find claimant's injury is unscheduled and shall be compensated as an industrial disability pursuant to Iowa Code section 85.34(2)(v).

Defendants alternatively assert that because claimant returned to work at the same or similar earnings with the same employer, his permanency benefits are limited to the functional impairment ratings. Iowa Code section 85.34(2)(v) I do not find defendants' argument convincing. Martinez v. Pavlich, Inc., File No. 5063900 (App. Dec. July 30, 2020).

The holding of Martinez is relatively straightforward. If an injured worker returns to work for the same employer and earns the same or greater wages than he or she did on the date of injury, the injured worker's entitlement to permanent disability benefits is limited to the functional loss unless or until the injured workers' employment relationship is terminated by either the injured worker or the employer. The defendant employer terminated its employment relationship with claimant in September 2020. As such, claimant is entitled to an industrial disability evaluation.

Mr. Turner asserts he is permanently and totally disabled. Defendants reject such an assertion.

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." Al-Gharib, 604 N.W.2d at 633.

In this instance, I found that Mr. Turner did not produce sufficient evidence to establish a prima facie case of total disability. Claimant has made no effort to secure alternative employment. He did not produce any evidence to show he attempted to return to the active workforce. Claimant did not submit a vocational assessment, and no physician has provided Mr. Turner cannot return to work in any capacity from a physical standpoint.

Nevertheless, claimant has sustained permanent disability and industrial disability must be determined. Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be

computed in the terms of percentages of the total physical and mental ability of a normal man."

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

Iowa Code section 85.34(2)(v) provides that the undersigned shall take into account the number of years into the future it was reasonably anticipated that the employee would work at the time of the injury. The section does not indicate how this Agency is supposed to consider this factor, and the parties did not present any evidence or argument regarding the same. That being said, I have considered the number of years into the future it was reasonably anticipated that the employee would work at the time of the injury. Iowa Code section 85.34(2)(v).

In this instance, having considered the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant proved he sustained a 40 percent loss of future earning capacity. Pursuant to Iowa Code section 85.34(2)(v), industrial disability is paid in relation to 500 weeks as the disability bears to the body as a whole. A 40 percent loss of earning capacity entitles claimant to an award of 200 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

The parties have stipulated that claimant's gross weekly earnings were $1,075.21. The parties have also stipulated that claimant was single and entitled to one exemption on the date of injury. The parties assert that the proper rate for workers' compensation benefits is $650.86. The parties' stipulations are accepted and I find claimant's rate is $650.86.

The parties have stipulated that the commencement date for permanent partial disability benefits is July 8, 2019. I accept the parties' stipulation and find permanent partial disability benefits shall commence on July 8, 2019.

The next issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits

in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "*b*", an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." Christensen, 554 N.W.2d at 260.

An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

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

The employer's failure to communicate the reason for the delay or denial to the employee contemporaneously with the delay or denial is not an independent ground for imposition of a penalty. Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299 (Iowa 2005).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

In this case, Mr. Turner asserts penalty benefits should be imposed upon defendants for their failure to pay PPD benefits for approximately 82 days. Claimant has established that a delay in benefits occurred. Defendants offer no evidence to establish that the basis for the delay or denial of weekly benefits was based upon any type of investigation, that the basis was reasonable, or that the basis was contemporaneously conveyed to claimant. Iowa Code section 86.13(4). Defendants have failed to establish the delay was reasonable in any manner.

I conclude that claimant is entitled to an award of penalty benefits. Eighty-two days of benefits is approximately 11.71 weeks of benefits, or $7,621.57. Having introduced no justification for the delay or denial of benefits, I conclude that a penalty award of $3,800.00 is justified and warranted under the circumstances of this case. Iowa Code section 86.13(4).

Lastly, claimant seeks reimbursement of the fees associated with Dr. Taylor's independent medical examination under Iowa Code section 85.39. 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.

Dr. Karam, an authorized treating physician, assessed claimant's permanent impairment relating to the right lower extremity on July 2, 2019. (JE2, pp. 68-69) Dr. Patterson, an authorized treating physician, assessed claimant's left shoulder permanent impairment on July 3, 2019. (JE2, p. 72) Dr. Taylor conducted an independent medical examination of claimant on December 3, 2020. (Ex. 1, p. 5) It is clear a physician, or in this case two physicians, assessed claimant's permanent impairment prior to claimant seeking out alternative impairment ratings from Dr. Taylor. I find claimant is entitled to reimbursement of Dr. Taylor's IME under Iowa Code section 85.39.

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).

Exhibit E is a copy of examination fees charged by Medix Occupational Health Services. Defendants included this exhibit to dispute the reasonableness of Dr. Taylor's IME fees under Iowa Code section 85.39(2). However, I do not find defendants' argument persuasive. In reviewing Exhibit E, it would appear as though the invoice is outdated. The invoice submitted dates back to July 1, 2015, lists the name of a physician that no longer works for Medix Occupational Health Services, and does not match the fees charged by Dr. Taylor, a physician at Medix. (See Ex. E; Ex. 8, p. 70) Moreover, Iowa Code section 85.39(2) requires defendants to establish *the* typical fee, not *a* typical fee. A single example is insufficient to establish the average fee in the local area where the examination was conducted. This is particularly true in the Greater Des Moines area.

It is also worth noting that Iowa Code section 85.39(2) does not limit reimbursement to the typical fee charged by a medical provider to calculate an impairment rating as defendants assert.

As defendants correctly point out, Iowa Code section 85.39 was amended in 2017 to include the following language:

> A determination of the reasonableness of a fee for examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code section 85.39(2). Importantly, the legislature only added the above language; it did not amend any of the original text. As such, Iowa Code section 85.39(2) continues to provide that an injured worker "shall … be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice[.]" It is clear the legislature did not intend to fundamentally change how independent medical examinations are conducted with this amendment. Rather, the legislature sought to provide guidance in determining the reasonableness of the IME fee.

The subject of the amendment is the reasonableness of the fee for examination, not the fee itself. Moreover, the amendment provides that a determination of the reasonableness shall be based on the typical fee charged by a medical provider to perform an impairment rating. The language utilized by the legislature is seemingly inclusive as opposed to exclusive. In other words, the amendment does not explain that the reasonable fee for a subsequent examination is the typical fee charged by a medical provider to perform an impairment rating. The amendment explains that determining the reasonableness of the subsequent examination fee is based on the typical fee

charged by a medical provider to perform an impairment rating. It logically follows that the legislature perceived a positive correlation between the reasonableness of the fee for an independent medical examination (whole) and the cost associated with the assessment of permanent impairment (part).

When making statutory changes, the legislature is deemed to have known and understood the status of the law, including any interpretations made by this agency and the Iowa Supreme Court as to existing statutes. Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015) Moreover, "legislative intent is expressed by omission as well as by inclusion of statutory terms." Freedom Fin. Bank v. Estate of Boesen, 805 N.W.2d 802, 812 (Iowa 2011); see In re Myers, 874 N.W.2d 679, 682 (Iowa Ct. App. 2015) ("When the legislature includes specific language in one section but omits it from another, we presume the legislature intended the omission.").

With this in mind, it is telling that the legislature kept the language providing an injured worker "shall … be reimbursed by the employer the reasonable fee for a subsequent examination[.]" The legislature did not replace "subsequent examination" with "impairment assessment," or define "examination" as an assessment of permanent impairment. It would be illogical to read Iowa Code section 85.39(2) as first providing an injured worker shall be reimbursed the reasonable fee for an IME – which defendants acknowledge would include the costs of reviewing medical records, conducting a physical examination, opining on causation, assessing permanent impairment, assigning restrictions, and addressing further treatment recommendations – only to later provide the injured worker is only entitled to reimbursement of an impairment assessment.

In its current form, Iowa Code section 85.39(2) expressly provides for the reimbursement of the reasonable fee for an IME. At no point does section 85.39(2) mention reimbursement of the cost of calculating an impairment rating. If the legislature intended for the amendment to limit an injured worker's IME reimbursement to the fees associated with obtaining an impairment rating, it could have expressly stated the same.

Dr. Taylor's invoice reflects $3,987.50 as the amount due. Defendants failed to submit evidence to show the typical fee charged by a medical professional to perform an impairment rating in the local area where the IME was conducted. I find the amount provided in Dr. Taylor's invoice is reasonable considering the time and effort needed to produce the report. Defendants are responsible to reimburse claimant for the entirety of Dr. Taylor's fee.

Finally, claimant seeks assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant has prevailed in his claim for permanent partial disability benefits. Therefore, I conclude it is appropriate to assess claimant's costs in some amount.

Claimant seeks assessment of his filing and service fees, totaling $127.72. This cost is appropriate and assessed pursuant to 876 IAC 4.33(7).

Claimant is seeking reimbursement in the amount of $169.95 for the cost of deposition transcripts. This cost is appropriate and assessed pursuant to 876 IAC 4.33(2).

Claimant is seeking reimbursement in the amount of $95.00 for the cost of the January 7, 2021, letter from Dr. Taylor. Agency rule 4.33(6) permits the assessment of the reasonable costs of "obtaining no more than two doctors' or practitioners' reports." This cost is appropriate and assessed pursuant to 876 IAC 4.33(6).

Claimant is seeking reimbursement in the amount of $4,000.00 for the cost of Dr. Adam Woods report. Agency rule 4.33(6) permits the assessment of the reasonable costs of "obtaining no more than two doctors' or practitioners' reports." However, the Iowa Supreme Court has held that only the cost of drafting the expert's report is permissible in lieu of testimony. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845-846 (Iowa 2015).

Exhibit 8 provides that Dr. Woods attributed $3,400.00 to the cost of reviewing records, compiling testing data, and writing the IME report. The costs associated with reviewing records and compiling testing data is not reimbursable. The invoice does not provide the costs associated with the drafting of the IME report. Therefore, exercising the agency's discretion, I conclude this expense cannot be taxed as a cost against defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay to claimant two hundred (200) weeks of permanent partial disability benefits commencing on July 8, 2019. All weekly benefits shall be payable at the weekly rate of six-hundred fifty and 86/100 dollars ($650.86) per week.

Defendants shall pay accrued weekly benefits in a lump sum together with interest payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, as required by Iowa Code section 85.30.

Defendants shall provide claimant future medical care for all treatment causally related to August 1, 2018, work injury.

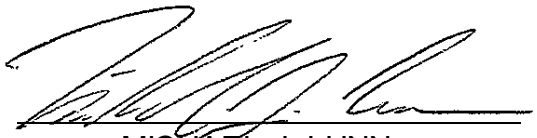
Defendants shall reimburse claimant's independent medical evaluation fee from Dr. Taylor in the amount of three-thousand nine-hundred eighty-seven and 50/100 dollars ($3,987.50).

Defendants shall pay claimant penalty benefits in the amount of three thousand eight hundred and 00/100 dollars ($3,800.00).

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

Costs are taxed to defendants pursuant to 876 IAC 4.33, as set forth in the decision.

Signed and filed this 24th day of February, 2022.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Thomas Wertz (via WCES)

Stephen Spencer (via WCES)

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