BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL SCULLARK,

Claimant,

vs.

PACKERS SANITATION SERVICES,

Employer,

and

ZURICH INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5050708

ARBITRATION DECISION

Head Note Nos.: 1802; 1803

STATEMENT OF THE CASE

Michael Scullark, claimant, filed a petition in arbitration seeking workers' compensation benefits from Packers Sanitation Services, employer and Zurich Insurance Company, insurance carrier, both as defendants. Hearing was held on July 30, 2015, in Waterloo, Iowa.

Claimant was the only witness testifying live at trial. The evidentiary record also includes claimant's exhibits 1-3 and defendants' exhibits A-M. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant is entitled to healing period benefits from June 18, 2014 through October 9, 2014.

2. The nature and extent of permanency claimant sustained as a result of the June 18, 2014 work injury.

FINDINGS OF FACT

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

I find that Mr. Scullark sustained permanent injury to his right knee, but that he did not sustain injury to his body as a whole. I further find that Mr. Scullark is entitled to additional healing period benefits.

There is no dispute that Mr. Scullark injured his right knee while working for Packers Sanitation Services, Inc. (PSSI) on June 18, 2014. However, there is a dispute as to whether Mr. Scullark's injury extends beyond his right lower extremity. Specifically, claimant contends that due to his right knee injury he walks with a limp and has an altered gait, which has affected his back and takes the injury out of the schedule and into the body as a whole.

Mr. Scullark testified that he injured his right knee at the beginning of his shift for PSSI on June 18, 2014. He reported the injury to his supervisor. He was in pain but was able to complete his shift. The next day he reported the injury to Regina at the PSSI corporate office, which is located downtown Waterloo. He told her he was going to People's Clinic, his primary care clinic, for treatment. However, she advised him that he had to be seen by the workers' compensation doctor. An appointment was made for Mr. Scullark to see David Kirkle, D.O. (Testimony)

Mr. Scullark saw Dr. Kirkle on June 20, 2014. Mr. Scullark reported that he slipped on stairs while carrying a heavy garbage can and injured his right knee. He was treated conservatively and released to restricted duty. (Exhibit E, pages 1-3) Mr. Scullark testified that when he returned to work he was placed in Green Meats, which is a light duty job located in the freezer. He testified that the room could get a bit crazy with all of the forklift activity. He was on Tramadol and a pain killer and because of those medications he said he was not feeling able to be in that cold of a room and around crazy drivers. He also testified that he was in pain. He reported these problems to his supervisor, who sent him home and told him to go see Regina and get a fit for duty note. He believes this all occurred on June 20, 2014.

According to Mr. Scullark, he did go see Regina and she instructed him to get a fit for duty note from his personal doctor. He had to wait two weeks to get an appointment and then when he did see the doctor, he would not give him a release for full duty. Mr. Scullark took the note to work and that is when PSSI advised him he had been terminated. (Testimony)

Mr. Scullark followed-up with Dr. Kirkle on June 27, 2014. He reported continued pain, and that he had been sent home by his employer several times, because they did not have light duty work for him. He reported that he rode his bike to work. He said he can get a few good pedals in and then let his right leg hang. He was prescribed

physical therapy and instructed to not ride his bike. He was released to restricted duty. (Ex. E, pp. 4-7) He continued to follow-up with Dr. Kirkle, who eventually ordered an MRI and referred him to orthopedics. (Ex. E, pp. 8-17)

On September 16, 2014, Mr. Scullark saw Thomas S. Gorsche, M.D. at Cedar Valley Orthopedics. He denied having any issues with his right knee prior to the June 18, 2014, work injury. He noted that Dr. Kirkle had placed claimant on light duty, but none was available. (Ex. A, p. 4) Dr. Gorsche's impression was medial meniscus tear with popliteal cyst. He recommended arthroscopic surgery. (Ex. A, pp. 4-5)

On October 9, 2014, Dr. Gorsche performed an arthroscopic partial medial meniscectomy on his right knee. (Ex. 1) At the time of the operation, Dr. Gorsche found a large medial meniscal tear. Following surgery he followed up with Dr. Gorsche. He was kept off work on October 9, 2014, until further notice. (Ex. A, pp. 6-7)

When Mr. Scullark returned to Dr. Gorsche on October 23, 2014, it was noted that he was no longer employed. (Ex. A, p. 8) Mr. Scullark underwent physical therapy.

On November 11, 2014, Dr. Gorsche restricted him to no squatting or kneeling. (Ex. A, p. 11) He continued to receive additional conservative care from Dr. Gorsche. Dr. Gorsche placed him at maximum medical improvement on January 28, 2015. He instructed Mr. Scullark that he may do regular duty work within the limits of his tolerance. (Ex. A, p. 15) On January 29, 2015, Dr. Gorsche opined that Mr. Scullark's injury resulted in two percent permanent impairment of his right lower extremity. (Ex. 9)

At his attorney's request, Mr. Scullark saw Richard F. Neiman, M.D. on March 26, 2015, for an independent medical evaluation (IME). (Ex. 3) Dr. Neiman is a neurologist with Neurological Associates of Iowa City, P.C. Dr. Neiman examined Mr. Scullark and felt that he was doing quite poorly as far as his right knee was concerned. He assigned two percent impairment of the lower extremity and one percent of the whole person. Dr. Neiman noted that Mr. Scullark does have "some problem with the back." (Ex. 3, p. 2) Overall, Dr. Neiman felt that his pain was legitimate but exaggerated. (Ex. 3, p. 4)

On July 7, 2015, Dr. Gorsche wrote a letter to defense counsel after he had a chance to review the IME report from Dr. Neiman. Dr. Gorsche stated that when he last evaluated Mr. Scullark he had excellent range of motion and no instability. (Ex. B, pp. 3-4) He further noted these findings were confirmed by Dr. Neiman. Dr. Neiman confirmed his impairment rating of two percent of the lower extremity. He did not feel that it was appropriate to assign any impairment based on functional gait derangement. He also noted that a gait derangement impairment cannot be combined with a diagnosis-based estimate. Thus, in his opinion, there was no basis for assigning impairment for gait derangement in Mr. Scullark's case. Dr. Gorsche pointed out that if Mr. Scullark had any gait derangement when he saw him, he would have documented that in his notes. (Ex. B, pp. 3-4)

According to the personnel information, the employment relationship between Mr. Scullark and PSSI ended on July 8, 2014. The documentation indicates PSSI considered Mr. Scullark to have quit his job because he was a no-call, no-show for three days. (Ex. I, p. 1)

At the request of the defendants, surveillance was conducted on Mr. Scullark on July 3, 2014. (Ex. J) Mr. Scullark was observed riding a bike without difficulty, including pushing off with his right leg. Additionally, Mr. Scullark was observed walking; sometimes he had a pronounced limp while other times he did not have a limp. (Ex. J)

At hearing, Mr. Scullark testified that his knee improved to some degree after the surgery. He feels the knee is still unstable. He testified he continues to take pain killers; he later clarified that the pain killers he was referring to were over-the-counter Tylenol. He said walking is a problem for him. He also testified that his knee hurts all the time; it aches, pops, and crackles. He testified that prior to his injury he was told he had a nice walk; now he feels as if he walks like an old man. (Testimony) At the request of his attorney he walked across the hearing room and back. Mr. Scullark did not appear to walk like an old man. The undersigned did not observe any noticeable limp or gait disturbance.

He testified that his right knee injury has affected his other knee and his hips. However, his hips do not bother him on a constant basis. His hips bother him if he sits too long. He testified that everything stiffens up and hurts until he starts walking and everything gets loosened up.

Mr. Scullark admitted that he was the one in the surveillance video biking. He was biking because that was his only way to get to school and work. It was either bike or walk. Walking made his knee worse than biking did. At least on the bike there were times he could coast and he could primarily pedal with his left leg.

The first issue to address is the nature and extent of permanency Mr. Scullark sustained as a result of the stipulated injury. In the present case, I find the opinion of orthopaedic surgeon, Dr. Gorsche to carry more weight than that of neurologist, Dr. Nieman. Dr. Gorsche treated Mr. Scullark over a period of several weeks and was the expert who performed the surgical repair on his knee. Furthermore, Dr. Gorsche's opinion is more consistent with the medical record as a whole. Dr. Nieman assigned permanent impairment for Mr. Scullark's back problems, but there is no mention of back issues in any of the treatment records from Dr. Kirkle or Dr. Gorsche. Additionally, the surveillance report does not support Mr. Scullark's claim that he consistently walks with a limp. For these reasons, I find the opinion of Dr. Gorsche to be most persuasive. I further find that claimant has failed to show by a preponderance of the evidence that he sustained any injury beyond his right lower extremity. I find Mr. Scullark has sustained two percent permanent impairment to his right lower extremity as a result of the June 18, 2014 work injury.

We now turn to Mr. Scullark's claim for healing period benefits from June 18, 2014 through October 9, 2014. This is the timeframe from the date of the injury until his knee surgery when defendants began paying healing period benefits. Claimant contends that he did not refuse any light duty work, did not quit his job, and therefore, is entitled to healing period benefits. Defendants argue that Mr. Scullark is not entitled to healing period benefits because he refused light duty work and abandoned his employment.

Mr. Scullark testified that he was available to work light duty from the date of his injury through the date of his knee operation. Claimant testified that he was able to finish his shift on the date of injury, June 18. Because claimant testified that he completed his shift on June 18, he is not entitled to healing period benefits for that date.

The next day, the 19th, he said he saw Regina, who made an appointment for him to see Dr. Kirkle. PSSI did not demonstrate that they offered him work on June 19. Rather, the evidence shows claimant had to wait to be seen by the workers' compensation doctor. He saw Dr. Kirkle on June 20. Dr. Kirkle placed restrictions on his work activity. (Ex. E, pp. 1-3) Mr. Scullark testified that the date he attempted to work light duty in Green Meats was the day he signed a form for PSSI. It appears the form he was referring to is the Disciplinary Form, which he signed on June 20, 2014. (Ex. J, p. 1) However, he testified he felt he could not work due to the effects of his medications and the cold temperature in Green Meats. (Testimony)

There is no evidence in the record to show that Mr. Scullark was restricted from working in a cold environment or from working around other individuals driving forklifts. There is no evidence to show that the work that PSSI offered Mr. Scullark starting on June 20, 2015, was not within his restrictions and was not suitable work. However, Mr. Scullark refused the suitable work. Therefore, I find that suitable work was offered to Mr. Scullark from June 20, 2015, until the time the employment relationship ended on July 8, 2015. However, Mr. Scullark refused the suitable work and therefore is not entitled to healing period benefits during this timeframe.

According to the "Employee Resignation/Termination Form" from PSSI, the employment relationship between PSSI and Mr. Scullark ended on July 8, 2015. Based on the form, it appears PSSI considered Mr. Scullark to have quit his job because he did not call into work or show up for work on July 2, July 3, or July 7, 2014. (Ex. I, p. 1) However, Mr. Scullark testified that he did not quit his job; rather, it was his understanding that he could not return to work until he had a fit for duty form from his own doctor. I find that Ms. Scullark was terminated due to a violation of an attendance policy. At the time of his termination Mr. Scullark was restricted to light duty work. (Ex. E, pp. 4-7) This agency has previously held an employee's failure to comply with the employer's attendance policy is not enough to constitute a refusal to perform suitable work. Therefore, I find that PSSI's offer of suitable work ended on July 8, 2014 when they terminated Mr. Scullark for three days of no-call/no-show. Because

Mr. Scullark had restrictions on his activities at that time, he is entitled to healing period benefits from July 8, 2014 through October 9, 2014.

I also find that suitable work was not offered to Mr. Scullark on June 19, 2014. This is the date that Regina called and scheduled an appointment for him to see Dr. Kirkle. When he did see Dr. Kirkle on the next day he placed claimant on restricted duty. Therefore, I find claimant has shown entitlement to healing period benefits on June 19, 2014 and July 8, 2014 through October 9, 2014 (13.571 weeks) at the stipulated weekly workers' compensation rate of $263.21.

CONCLUSIONS OF LAW

The first issue to address is whether this is a scheduled member injury or an industrial loss.

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

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2), the disability is considered a scheduled member disability. "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1921). A scheduled disability is evaluated solely by the functional method and the compensation payable is limited to the number of weeks set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Pursuant to Iowa Code section 85.34(2)(u), the commissioner may equitably prorate compensation payable in those cases where the functional loss is less than 100 percent. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

On the other hand, if it is found that the work injury was a cause of permanent physical impairment of loss of use involving a body member not listed in the Code section, the disability is considered an unscheduled disability to the body as a whole and compensated under Code subsection 85.34(2)(u). The industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 886, 997 (1983). Unlike scheduled member disability, the extent of unscheduled or industrial disability is determined by assessing the loss of earning capacity resulting from the work injury. Diederich v. Tri-City R. Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physical impairment or restriction on work activity may or may not result in a loss of earning capacity.

The work injury of June 18, 2014 caused permanent impairment to the right lower extremity, but not to the body as a whole. As such, the injury is scheduled and not industrial.

The next issue is the extent of claimant's entitlement to permanent partial disability pursuant to Iowa Code Section 85.34(o). Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> [T]he legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the

scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

I found Mr. Scullark sustained two percent permanent loss of use of his right lower extremity due to the June 18, 2014 work injury. Based on such a finding, the claimant is entitled to 4.4 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(o), which is 2 percent of 220 weeks, the maximum allowable weeks of disability for an injury to the leg in that subsection.

We now turn to the issue of healing period benefits. Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

For a claimant to be disqualified from healing period benefits the employer must prove that he or she refused to perform suitable work offered by the employer. The correct test is (1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3). Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010).

Although it is not articulated in the Schutjier case, this agency has applied this analysis to both temporary partial disability benefits and healing period benefits. Mr. Scullark was offered work within his restrictions on June 20, 2015. This work was in the Green Meats department in the freezer. Mr. Scullark testified that he attempted to perform this work but did not feel he was able to perform this work due to the medications he was on for his right knee injury and due to the cold temperature. When he advised his supervisor he could not perform the work, he was sent home and told to return with a fit for duty slip. There is no indication in the record that the work offered to Mr. Scullark was not within the medical restrictions assigned to him at that time.

Therefore, I concluded Mr. Scullark refused suitable work and is not entitled to healing period benefits from June 20, 2014 until the time of his termination on July 8, 2014.

We now turn to the period of time from his termination to the date of his knee surgery. Under Iowa law, an employer has an obligation to offer an injured worker "suitable work". If they cannot offer suitable work for the injured employee, then the injured employee is entitled to temporary benefits. However, if an employee refuses to accept suitable work, then the injured employee is not entitled to temporary benefits. When there is a termination of an employee for reasons unrelated to the work injury, then the specific facts of each case must be carefully analyzed to determine whether the employee's conduct which prompted the termination is conduct tantamount to a "refusal to perform work." If the employee's conduct is a refusal to perform work, then the employer's obligation to provide temporary benefits ceases during the period of the employee's refusal.

In the present case, Mr. Scullark had not returned to full duty work prior to his termination. Thus, we must determine if his actions preceding the termination constituted a refusal to accept suitable work. This agency has indicated that an employee's failure to comply with the employer's work rule or attendance policy is not enough to constitute a refusal to perform suitable work. Alonzo v. IBP, Inc., File No. 5009878 (App. October 31, 2006); Franco v. IBP, Inc., File No. 5004766 (App. February 28, 2005); Woods v. Siemens-Furnas Controls, File Nos. 1303082, 1273249 (Arb. Dec. July 22, 2002) (Final Agency Action). The burden of proof to show a refusal of suitable work is on the employer. Koehler v. American Color Graphics, File No. 1248489 (App. February 25, 2005). Here there appears to have been a communication issue surrounding the end of Mr. Scullark's employment. Mr. Scullark testified that he was told he could not return to work until he had a fit for duty form. He also testified that Regina told him he had to see his personal doctor to obtain that form. This testimony is troubling because he also testified that Regina was the PSSI representative who originally told him he had to go see the workers' compensation doctor; however, there was no testimony to contradict Mr. Scullark's account of events. According to the personnel file Mr. Scullark's employment ended because he was a no-call/no-show for three days. This appears to be a violation of PSSI's attendance policy. Thus, according to prior agency holdings, I conclude that Mr. Scullark is entitled to healing period benefits from July 8, 2014 through October 9, 2014. Based on the above findings, I also conclude claimant is entitled to healing period benefits on June 19, 2014.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant four point four (4.4) weeks of permanent partial disability benefits at the stipulated weekly workers' compensation rate of two hundred sixty-three and 21/100 dollars ($263.21).

Defendants shall pay claimant healing period benefits for June 19, 2014 and from July 8, 2014 through October 9, 2014 (thirteen point five seven one [13.571] weeks) at the stipulated weekly workers' compensation rate of two hundred sixty-three and 21/100 dollars ($263.21).

Defendants shall pay all accrued benefits in a lump sum.

Defendants shall pay interest pursuant to Iowa Code section 85.30 on any benefits paid after they became due.

Defendants shall be entitled to those credits outlined and stipulated to on the hearing report.

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.

Signed and filed this 10th day of September, 2015.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Carter Stevens
Attorney at Law
PO Box 956
Waterloo, IA 50704-0956
lawfirm@rsplaw.biz

Edward J. Rose
Attorney at Law
1900 E. 54th St.
Davenport, IA 52807
ejr@bettylawfirm.com

EQP/srs

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.