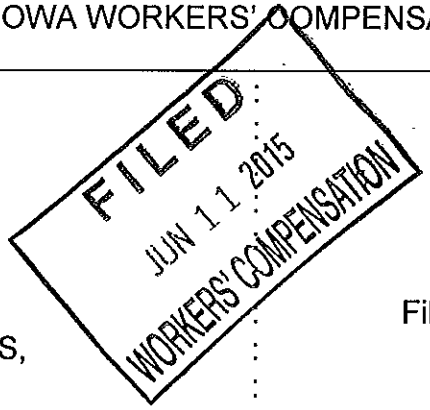
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



KEN HASS,

Claimant,

vs.

EXIDE TECHNOLOGIES,

Employer,

and

TRISTAR RISK MANAGEMENT,

Insurance Carrier,
Defendants.

File Nos. 5048470, 5048471

ARBITRATION

DECISION

Head Note Nos.: 1802, 1803, 2501, 2701

STATEMENT OF THE CASE

Claimant, Ken Hass, filed petitions in arbitration seeking workers' compensation benefits from Exide Technologies (Exide), employer, and Tristar Risk Management, insurer, both as defendants. This case was heard in Cedar Rapids, Iowa on April 22, 2015.

The record in this case consists of claimant's exhibits 1-14, defendants' exhibits A-E, and the testimony of claimant.

At hearing, claimant dismissed the petition in File No. 5048471 (date of injury September 3, 2013). This arbitration decision and order concerns File No. 5048470 (date of injury March 23, 2012).

ISSUES

1. The extent of claimant's entitlement to temporary benefits.

2. The extent of claimant's entitlement to permanent partial disability benefits.

3. Whether there is a causal connection between the claimed medical expenses of claimant's injury.

4. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

5. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

FINDINGS OF FACT

Claimant was 54 years old at the time of hearing. Claimant graduated from high school. Claimant began working for Exide in 1985. He worked for Exide until 2009. He said he left Exide sometime in 2009 and returned to work for the company in 2010. (Exhibit 8, page 75) Claimant testified he has worked approximately 30 years at Exide.

Exide manufactures batteries. In March of 2012 claimant worked in a production line. Claimant would insert elements into a battery. He would then twist and push the battery further down a production line.

Claimant said in March of 2012 he turned to push a battery and heard a pop in his right foot. He said he felt a burning sensation in his right foot.

On April 24, 2012 claimant was evaluated by Ann Mead, PA-C. Claimant said he had pain in his right foot when he turned and heard a pop sound. Claimant had continued right foot pain. Claimant was assessed as having a fractured cuboid. He was told to ice and rest his foot. (Ex. 6, pp. 43-44)

In an April 27, 2012 letter, Kenneth McMains, M.D., indicated claimant's injury did not appear work related. (Ex. A, p. 1)

Claimant returned to Physician's Assistant Mead on May 1, 2012 with continued complaints of right foot pain. Claimant noted a walking boot appeared to help with pain, but he could not return to work with a walking boot. Claimant was told to rest his foot as much as possible and to have an orthotic put in his work shoe. (Ex. 6, p. 45)

Claimant testified he kept working with foot pain. He said his foot continued to get worse. Claimant said his foot was very painful, and he often had difficulty completing his work shift due to foot pain. He said his foot pain eventually got so bad that he had to return to see a physician.

Claimant was evaluated by C. Dan Meyer, PA-C on August 21, 2013 with continuing complaints of right foot pain. Claimant was referred to a podiatrist. (Ex. 6, p. 49)

On September 3, 2013 claimant was evaluated by Kelsey Harvey, DPM with complaints of right foot pain. Claimant was assessed as having a fractured cuboid of the right foot. Surgery to excise fractured fragments of bone was recommended. (Ex. 4, pp. 8-10)

In a September 4, 2013 letter, Lloyd John Luke, M.D. opined claimant had a preexisting condition that manifested itself at work, but not because of work. Based on this opinion, he found claimant's injury was not work related. (Ex. A, pp. 2-3)

On September 10, 2013 claimant underwent surgery on his right foot by Dr. Harvey. Surgery consisted of attempted removal of fractured fragments of the right cuboid. (Ex. 4, pp. 11-12; Ex. 5, p. 40)

Claimant testified Dr. Harvey told him surgery was not successful and Dr. Harvey was not able to locate the bone fragments. Claimant testified he was told he would have to live with foot pain.

On September 17, 2013 claimant was evaluated by Dr. Harvey. At that time Dr. Harvey told claimant to avoid weightbearing on the right foot. Claimant was kept in a walking boot. (Ex. 4, p. 14)

Claimant returned in followup with Dr. Harvey from September 17, 2013 to November 12, 2013. On November 12, 2013 claimant was allowed to be full weightbearing on the right foot. (Ex. 4, p. 21)

Claimant continued to treat in followup care with Dr. Harvey until December 31, 2014. On December 31, 2014 Dr. Harvey returned claimant to work with no restrictions. (Ex. 4, pp. 22-24)

In a January 13, 2015 report, Stanley Mathew, M.D., gave his opinions of claimant's condition following an IME. Claimant complained of pain in the right leg, right foot, and into the right hip and lower back. Claimant had an antalgic gait. Claimant was assessed as having severe atrophy to the right lower extremity, and avulsion fracture with a failed surgery and lumbosacral radiculopathy. Using Table 17-8 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he found claimant had a 40 percent combined permanent impairment to the body as a whole. He opined claimant would benefit from aggressive physical therapy for his right lower extremity, an MRI of the lower back, and electrodiagnostic studies of the lower extremity to evaluate problems with atrophy in the right lower extremity. He also recommended a followup with a pain specialist. (Ex. 1)

In a February 11, 2015 letter Dr. Luke indicated he reviewed Dr. Mathew's report. Dr. Luke opined Dr. Mathew's opinions were based on Table 17-38 of the Guides regarding lower extremity impairment due to peripheral vascular disease. Dr. Luke believed Table 17-3 was the more appropriate method to evaluate claimant's permanent impairment. Dr. Luke opined that using Table 17-3 resulted in a 27 percent permanent impairment to the body as a whole for claimant. (Ex. 3)

In a March 17, 2010 letter to defendants' counsel, Dr. Luke opined claimant's foot injury was work related. He also opined claimant's complaint in his ankle, knee, and hip

would also be work related. He reiterated his opinion that claimant had a 27 percent permanent impairment to the body as a whole. (Ex. 14)

In an April 20, 2015 report, Patrick Hartley, M.B., gave his opinions of claimant's condition following an IME. Professor Hartley is a professor of internal medicine with the University of Iowa Hospitals and Clinics. Claimant complained of right hip and knee discomfort. Claimant complained of right leg stiffening. Claimant indicated a loss of range of motion in his right foot and knee. Claimant also complained of chronic discomfort in the right foot. (Ex. B, pp. 1-4)

Professor Hartley noted claimant had atrophy in the right leg. Claimant also had loss of range of motion in the right hip. Professor Hartley found claimant sustained an injury to his right foot in March of 2013 that was related to work. He found claimant was at maximum medical improvement (MMI) regarding the right foot injury as of January 4, 2014. Professor Hartley indicated he would not opine on claimant's right hip and knee pain, as they had not been fully evaluated. He found claimant had a ten percent permanent impairment to the foot converting to a seven percent permanent impairment to the lower extremity. Professor Hartley disagreed with the rating from Dr. Mathew. This is because claimant's muscle weakening in the lower extremity has not been fully evaluated, and because a 40 percent permanent impairment to the body as a whole for the lower extremity injury, was the same rating given to an above-the-knee amputation. (Ex. B, p. 5)

Professor Hartley recommended claimant have x-rays of the right hip and knee to evaluate problems in those body parts. He agreed a neurodiagnostic study would be helpful in evaluating claimant's right lower extremity. (Ex. B, pp. 5-6)

Claimant testified at hearing he was still working full time at Exide in a production line. He said he tries to avoid putting too much pressure on his right foot. Claimant said he is in constant pain. Claimant said he has pain in his right foot, leg, hip and low back. Claimant said he had hip and back pain both before and after surgery.

Claimant says he wants to keep working at Exide. He says he performs his work as best as he can given his limitations with his right foot, leg and hip. Claimant says he has right foot, leg and right hip pain every day. Claimant said he has not gotten treatment for his hip and lower back, as he cannot afford to take time off of work.

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to temporary benefits.

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

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits.

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

Claimant seeks temporary benefits from April 12, 2012 through May 13, 2012. The record indicates claimant was taken off of work for his right foot condition by Physician's Assistant Mead beginning on April 24, 2012 through May 13, 2012. (Ex. 6, pp. 43-48) Claimant was also paid short-term disability (STD) benefits during this period of time for his time off work. (Ex. 10, p. 100) I do not have any records that claimant was off work from April 12, 2012 through April 24, 2012. Claimant is due healing period benefits from April 24, 2012 through May 13, 2012.

Claimant also seeks temporary benefits from September 17, 2013 through November 12, 2013. On September 17, 2013 claimant was evaluated by Dr. Harvey. At that time claimant was told to avoid weightbearing on the right. (Ex. 4, p. 14) Claimant was allowed to have full weightbearing on the right on November 12, 2013. (Ex. 4, p. 21) See Also Exhibit 1, pages 1-2. Claimant was paid STD benefits for the period of September 17, 2013 through November 12, 2013. (Ex. 10, p. 102) Claimant is due healing period benefits from September 17, 2013 through November 12, 2013.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

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

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

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

Claimant credibly testified he has difficulty walking and standing due to foot pain. He credibly testified he has hip and low back pain both before and after his 2013 surgery. Claimant credibly testified that, at the time of hearing, he continues to have hip and low back pain, along with leg and foot pain, and has problems with standing and walking due to his right foot.

Three experts have opined regarding the extent of claimant's disability.

Dr. Mathew opined claimant has a disability that extends into his body as a whole. (Ex. 1, pp. 1-3)

Dr. Luke, a physician retained by defendants, also opined in two reports that claimant's disability is to the body as a whole. (Ex. 3; Ex. 14)

Professor Hartley, another expert retained by defendants, evaluated claimant for an IME. Professor Hartley deferred in assigning permanent impairment to claimant's right hip and knee. This is because he did not believe claimant's right hip and knee pain was fully evaluated, and he was unable to opine if claimant's knee and hip pain were at MMI. (Ex. B, p. 5) Professor Hartley did note that claimant's right leg was weaker than the left. He also noted claimant's right thigh and calf had showed signs of atrophy. Professor Hartley also found claimant had a loss of range of motion in the right hip. (Ex. B, pp. 4-6)

I understand Professor Hartley's position regarding limiting claimant's permanent impairment to his right foot. However, both Dr. Mathew and Dr. Luke found claimant has a permanent disability to the body as a whole. Dr. Luke, the employer-retained physician, opined on two different occasions, in response to defendants' counsel, that he found claimant had a permanent impairment to the body as a whole. (Ex. 3 and 14) Dr. Mathew opined claimant has a body as a whole impairment. Dr. Luke, the employer-retained physician, also opined claimant has a body as a whole impairment. Given this record, I find the opinions of Dr. Mathew and Dr. Luke more convincing than the opinions of Professor Hartley regarding the extent of claimant's permanent impairment.

Dr. Luke found claimant had a 27 percent permanent impairment to the body as a whole. Both he and Professor Hartley note that Dr. Mathew's findings, that claimant has a 40 percent permanent impairment to the body as a whole, is high. This is based, in part, on an understanding that amputation above the knee, under the Guides, would result also in a 40 percent permanent impairment to the body as a whole. (Ex. B, p. 5) Based on this, it is found Dr. Luke's finding that claimant has a 27 percent permanent impairment to the body as a whole is more convincing than the opinion given by Dr. Mathew.

It is found claimant has a 27 percent permanent impairment to the body as a whole. Claimant credibly testified he has constant right foot, knee, hip and lower back pain caused by his foot injury. The record indicates claimant's gait is impaired due to his foot, hip and back condition. Claimant has no permanent restrictions. He earns approximately the same hourly wage as he did at the time of the accident. Claimant has worked some overtime since returning to work from surgery. When all relevant factors are considered, it is found claimant has a 30 percent loss of earning capacity or industrial disability.

The next issue to be determined is if there is a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant testified his medical costs, found at Exhibit 9, are out-of-pocket expenses that were paid by claimant. Defendants have accepted liability of claimant's 2012 injury. Defendants are liable for reimbursing claimant for his copayments found at Exhibit 9.

The next issue to be determined is if claimant is due reimbursement for an IME 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. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

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

In April of 2012, Dr. McMains, the employer-retained physician, gave his opinions of claimant's injury following an IME. This was followed by a September of 2013 opinion by Dr. Luke. In January of 2015 Dr. Mathew, the employee-retained physician, gave his opinions regarding claimant's condition. Based on this record, claimant is due reimbursement for the IME by Dr. Mathew.

The final issue to be determined is if claimant is entitled to alternate medical care.

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

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly

> and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

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

Dr. Mathew opined claimant should have physical therapy of the right lower extremity and electrodiagnostic testing of the lower extremity. (Ex. 1, p. 3) Professor Hartley, the employer-retained physician, opined neurodiagnostic testing, as suggested by Dr. Mathew, would be helpful in ruling out neuropathy to claimant's right lower extremity. Given this record, claimant has established he is entitled to alternate medical care consisting of the neurodiagnostic testing.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant healing period benefits from April 24, 2012 through May 13, 2012, and from September 17, 2013 through November 12, 2013 at the rate of four-hundred seventy-four and 70/100 dollars ($474.00) per week.

That defendants shall pay claimant one-hundred fifty (150) weeks of permanent partial disability benefits at the rate of four-hundred seventy four and 70/100 dollars ($474.70) per week commencing on January 1, 2014.

That defendants shall pay accrued benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as awarded above and as set forth in Iowa Code section 85.30.

That defendants shall reimburse claimant for the claimed medical expenses.

That defendants shall furnish claimant with the alternate medical care consisting of neurodiagnostic testing.

That defendants shall receive a credit for benefits previously paid.

That defendants shall pay the costs of this matter.

That defendants shall file subsequent reports of injury as required under Rule 876 IAC 3.1(2).

Signed and filed this 11th day of June, 2015.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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