BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEO THEPPANYA,

Claimant,

vs.

ALTER TRADING CORPORATION,

Employer,

and

HARTFORD FIRE INSURANCE COMPANY,

Insurance Carriers,
Defendants.

File No. 5046632

ARBITRATION DECISION

Head Note Nos.: 1803; 1803.1

STATEMENT OF THE CASE

Claimant filed a petition for arbitration seeking workers' compensation benefits from Alter Trading Corporation and Hartford Fire Insurance Company.

The matter came on for hearing on January 30, 2015, before deputy workers' compensation commissioner, Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibit 1; defense exhibits A through P, and the sworn testimony of claimant, Keo Theppanya, claimant's daughter Phonemany Theppanya and the facility manager, Jason Woods. The parties briefed this case and the matter was fully submitted on March 3, 2015. Jeera Khomrueangsri served as the interpreter for the hearing and Kristi Miller was the court reporter.

ISSUES

The fighting issue in the case is the nature and extent of the claimant's disability. The claimant alleges he is permanently and totally disabled as an odd-lot employee while the defendants contend the claimant's disability is limited to his left leg.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of the injury.

2. Claimant sustained an injury which arose out of and in the course of employment on January 11, 2012.

3. The admitted injury is a cause of both temporary and permanent disability.

4. Temporary disability and/or healing period benefits are not in dispute.

5. The commencement date for any permanent partial disability benefits is April 9, 2013.

6. The weekly rate of compensation is $548.54.

7. Defendants have paid and are entitled to a credit of 115.75 weeks of permanent partial disability benefits.

8. Medical payments are not in dispute.

9. Affirmative defenses have been waived.

FINDINGS OF FACT

The claimant, Keo Theppanya, is a 62-year-old Laotian immigrant. He came to America in 1987. He lives with his family on the north side of Des Moines, Iowa. He has a close relationship with his 4 grown children and 12 grandchildren.

The claimant completed the fourth grade in Laos. This is the extent of his formal education. He does not speak, read or write in English. His native language is a dialect of Laotian. He began working for the defendant employer, Alter Trading Corporation, a scrap processor, in approximately 1997. He drove a Bobcat.

The claimant sustained a catastrophic injury to his left leg and foot while working for the employer on January 11, 2012. He was helping with the brakes on railroad carts. In the process, he slipped and his left foot became caught between two rail couplers, crushing his left foot and leg. (Hearing Transcript, pages 30-31; Defendants' Exhibit O, p. 127)

On January 17, 2012, he underwent surgery in an apparent effort to save his left foot. On January 19, 2012, he underwent a left Syme amputation due to the massive degloving injury. (Def. Ex. D, pp. 58-60) His follow up treatment was offered through Jon Gehrke, M.D., a foot specialist. Dr. Gehrke saw claimant numerous times between February and August 2012, although he documented very little. (Def. Ex. E) He was fitted for a prosthesis in April 2012. (Def. Ex. F, p. 71) Robert Rondinelli, M.D., provided medical care for fitting the prosthesis. He was provided physical therapy in addition to counseling related to using the prosthesis.

Claimant returned to work for the employer on April 16, 2012, initially in a light-duty capacity. (Def. Ex. C, p. 7)

On May 15, 2012, Dr. Rondinelli noted that claimant's "gait was antalgic with decreased weightbearing and stance phase on his Syme's prosthesis." (Def. Ex. F, pp. 72-73) Dr. Rondinelli evaluated claimant's ability to ambulate in June 2012 both with a cane and without. "He maintains good midline and has no obvious antalgic behavior with the cane. Without the cane, he slows down and shows increasing antalgic behavior. He is safe either way, and the cane appears optional at this time." (Def. Ex. F, p. 74)

In July, claimant underwent a functional capacity evaluation (FCE). (Def. Ex. G) He was released to work in the medium work classification, with a maximum lift of 40 pounds (2 handed) up to waist level. (Def. Ex. G, p. 86) He is required to limit his walking and standing.

On August 9, 2012, Dr. Rondinelli noted that he had been provided with work hardening and an FCE.

> Since his last visit, we provided him with work hardening, a functional capacity evaluation, and a job-site evaluation. I have reviewed the reports in relation to these experiences. His functional capacity evaluation upon completion of work hardening demonstrates that he can safely tolerate material at a "Medium" category of work . . . – specifically he can perform a 2-hand maximum lift of 40 pounds from 9 inch to waist level. He demonstrates good body mechanics in this regard.
>
> A job-site analysis was also carried out since he is working with restricted duty at this time. He was noted to be capable of frequent standing and performing sorting tasks done at modified work stations if allowed to sit 4 times an hour to unload his left lower extremity. He can occasionally climb with 3 points of contact into and out of a forklift or drive a forklift as needed throughout the facility. It was recommended that he not operate a skid loader or Bobcat, avoid ladders, avoid standing all day without an opportunity to sit and offload his left lower extremity, and he should not walk unlimited or for prolonged distances especially on uneven surfaces.
>
> He is currently using a single cane when he ambulates. He is complaining that his prosthesis is fitting too tightly around his calf and interfering with his gait. He is complaining of pain on weightbearing at the distal aspect of his stump.

> I examined his gait. He is mildly antalgic leaning excessively to the right to avoid weightbearing during stance phase on the left side. He leans excessively on a right-handed cane.

(Def. Ex. F, p. 76) Dr. Rondinelli ordered further adjustment of the prosthesis, and medications for pain control. The job site analysis was performed on August 8, 2012 and is in the record. (Def. Ex. H, p. 93)

Dr. Rondinelli followed up diligently in September to review the adjustments to the prosthesis. (Def. Ex. F, p. 78) In November, Dr. Rondinelli noted that claimant reported that the employer did not consistently honor his medical restrictions. "He was on his feet for almost seven hours a day yesterday and today, and consequently this has reactivated some tenderness over the medial distal aspect of his Syme's residual limb." (Def. Ex. F, p. 80) He noted on that date, however, that the prosthetic adjustments had worked. "His gait is not appreciably antalgic at this time as he has got good symmetry in stance phase and functional rate of progression throughout the gait cycle." (Def. Ex. F, p. 80) Dr. Rondinelli ordered further restrictions to allow claimant to rest four times per hour and that he not exceed a total of four hours standing per shift per day. (Def. Ex. F, p. 80)

By January 2013, his condition was substantially stabilized. "Overall he is now ambulating without the cane and having less pain with gait and is functioning quite well. . . . He can ambulate without a cane, with minimal antalgic gait pattern at this time." (Def. Ex. F, p. 82) He stated claimant is able to remain at work and perform his duties with reasonable accommodation without further problem and continued him on restrictions of "4 hours standing maximum per shift, per day, allowing him 4 breaks per hour to rest and his material handling restrictions" per the FCE. (Def. Ex. F, p. 83)

He had a final follow-up with Dr. Rondinelli in April 2013. Dr. Rondinelli performed a remarkably thorough examination and review of claimant's condition. He specifically noted "no hip abductor weakness or proximal pain . . ." (Def. Ex. F, p. 85) He provided an impairment rating of 62 percent of the left lower extremity which converts to 25 percent of the whole body and discharged him from active care. (Def. Ex. F, p. 85)

On November 4, 2013, Robin L. Sassman, M.D., performed an independent medical evaluation of the claimant. (Cl. Ex. 1, pp. 1-8) Dr. Sassman performed a thorough review of the records in the case, as well as a thorough physical examination. She noted he was not receiving any active medical treatment outside of visits to American Prosthetics as needed for adjustments to his prosthesis. (Cl. Ex. 1, p. 3) Dr. Sassman recorded his current symptoms as follows:

> Current Symptoms -- He describes pain at the site of the stump. He states there is one area over the anterior aspect of the stump that is

> painful in his prosthesis. He also describes having symptoms of phantom pain at times. He denies any hip pain or back pain since the accident.

(Cl. Ex. 1, p. 3) She also noted the various activities which aggravated the symptoms in his left leg. Virtually any use of his legs aggravates his condition. The following activities were noted: standing, stooping, crawling, walking, kneeling, working below his waist, working outdoors, working on ladders, stairs and uneven surfaces.

Dr. Sassman found a 27 percent whole body functional impairment, noting that The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, do not allow certain ratings to be combined. It is noted that Dr. Sassman had found additional impairment for "muscle atrophy" but the AMA Guides prohibit such loss from being combined with the loss for amputation. (Cl. Ex. 1, pp. 6-7) Dr. Sassman was slightly more aggressive with claimant's restrictions as well. She recommended the following:

> I would recommend that Mr. Theppanya limit lifting, pushing, pulling and carrying to 20 pounds occasionally from floor to waist, waist to shoulder and over the shoulder. He may occasionally sit[,] stand and walk, but should be able to sit whenever he needs to. He states that if he is on his prosthesis for too long, it becomes very painful. He will need to sit at least 4 times per hour for 5 minutes as needed for stump pain. I would not recommend using a ladder. He may rarely use stairs, but should always use the handrail when doing so. I would not recommend walking on uneven walking on uneven surfaces. He should not use the left lower extremity to operate foot petals. I would not recommend crawling and he should rarely kneel.

(Cl. Ex. 1, p. 7)

Claimant continues to work for the employer, full-time. He is a laborer and he spends most of his time sorting metals. I find that he is a proud man and he is highly motivated. His work is undoubtedly heavily accommodated but it is real work, not a makeshift job. He earns more per hour than he did at the time of the injury. Claimant's productivity has not declined. (Tr., p. 88)

An expert vocational report was submitted by the claimant. Carma Mitchell, M.S., C.D.M.S, C.R.C., opined that claimant has lost access to 100 percent of jobs he had access to prior to the injury and is only able to maintain employment because of special accommodations. (Cl. Ex. 1, July 29, 2013 Report)

CONCLUSIONS OF LAW

All of the legal questions in this case revolve around the issue of the nature and extent of the claimant's disability. The claimant alleges that the claimant's stipulated January 2012, work injury resulted in his development of pain and disabling conditions

throughout his body as a whole and that his disability should be evaluated industrially. The defendants contend that the situs of the claimant's injury is limited to his left leg and must be evaluated as a scheduled claim under Iowa Code section 85.34(2)(o) (2015).

The burden is on the claimant to prove the situs of the injury through competent medical evidence using the legal standards for medical causation.

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).

This agency has held that pain or other subjective complaints, even without objective findings, can establish permanent impairment or permanent disability. Suljevic v. Tyson Fresh Meats, Inc., File 5017829, (App. March 27, 2008). McGregor v. Jet Company, File No. 5011648 (App. August 30, 2006). The Iowa workers' compensation system has a long history of compensating pain complaints as industrial disabilities if they are found to be disabling. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961) [complex regional pain syndrome formerly called Sudeck's atrophy, causalgia, or reflex sympathetic dystrophy (RSD)]; Ehteshamfar v. UTA Engineered Systems, 555 N.W.2d 450 (Iowa 1996) (tinnitus); Young v. EDS Distribution Services, File Nos. 5006837 & 5006838, (Arb. August 2, 2004) summarily affirmed (App. September 21, 2005) (permanent total disability and penalties awarded for chronic pain).

When an injury causes severe pain requiring medical treatment and there is sufficient evidence to find that the pain is disabling, the disabling pain is compensable and treated as an unscheduled injury. This includes phantom pain from loss of a limb.

Dowell v. Wagler, 509 N.W.2d 134 (Iowa App. 1993). In Dowell, the Court of Appeals held:

> We therefore hold that phantom pain syndrome or phantom limb syndrome may be compensable under Iowa Code section 85.34(2)(u) as an unscheduled disability. Applying the industrial disability test to a given case will require a determination both of the functional loss to the body as a whole and of the change in earning capacity of the individual.

Dowell, 509 N.W.2d at 138. The Court of Appeals suggested that the pain must be determined to be sufficient enough to be a separate and distinct impairment. Id. at 137.

The claimant has not met his burden of proof to demonstrate entitlement to industrial disability. I find that the greater weight of the evidence suggests the claimant has suffered a severe functional disability to his left leg. While this has resulted in a near total loss of function of his left leg, he has failed to prove by a preponderance of evidence that the claimant has any condition or diagnosis that would extend his condition into his body as a whole.

I do note that the claimant testified extensively at hearing that he has pain in various parts of his body which are not included in the schedule and extend beyond his left leg. (See Tr., pp. 17-19, 38, 41-43, 47-48) I find the claimant's testimony generally believable. The claimant, in fact, specifically described textbook phantom pain at hearing. (Tr., p. 19, lines 10-15) I am largely unconcerned about the discrepancies between his hearing testimony and his deposition testimony. I believe these discrepancies likely exist because of the language barrier from the claimant's unusual dialect. Nevertheless, the record is clear in that no physician has diagnosed or treated the claimant for hip pain, back pain or phantom pain. Prior to the date of hearing, there has really been no medical workup for these conditions or symptoms.

The Dowell Court cited authority from New Mexico which held that disabling phantom pain is compensable industrially, but not all pain is sufficient to qualify as a separate and distinct impairment. Dowell, 509 N.W.2d at 137-138. While I generally believe the claimant that he has pain in various parts of his body at the time of hearing, including some symptoms of phantom pain, he has failed to prove that those symptoms amount to any disabling diagnosis or diagnoses at the time of hearing.

The claimant's treating surgeon, Dr. Gehrke, did not document or diagnose any complaints of pain or conditions other than the left foot and leg. Likewise, Dr. Rondinelli, did not document or diagnose any complaints or conditions other than the difficulties from the left leg amputation. Dr. Rondinelli did, however, diagnose and discuss gait issues, which are in fact known to contribute to hip and back problems. Dr. Rondinelli, however, specifically noted on occasion that no such problems had developed during his period of treatment through April 2013. Dr. Sassman saw the claimant in November 2013, and specifically noted that the claimant denied any hip or

back complaints at that time. (Cl. Ex. 1, p. 3) She did, however, note that he "describes having symptoms of phantom pain at times." (Cl. Ex. 1, p. 3) Dr. Sassman, however, failed to list the phantom pain as a "diagnosis" for which she rated the claimant. (Cl. Ex. 1, p. 5) She did not provide a permanent impairment rating for the condition of phantom pain. (Cl. Ex. 1, pp. 6-7) Based upon the record before me, there is no record of the claimant pursuing medical treatment after his last visit with Dr. Rondinelli in April 2013.

Therefore, while I believe that the claimant has developed some symptoms of hip and back pain since November 2013, and has periodically experienced symptoms associated with phantom pain, I do not have enough evidence to find that those symptoms amount to a permanent condition justifying an award of industrial disability. As a consequence, I find that, at this time, claimant's disability is limited to his left leg and must be evaluated under Iowa Code section 85.34(2)(o). The disability is evaluated based upon the loss of function and is capped at 220 weeks.

The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, has been adopted as a guide for determining an injured worker's extent of functional disability. Rule 876 IAC section 2.4. In making an assessment of the loss of use of a scheduled member, however, the evaluation is not limited to the use of the AMA Guides. Lay testimony and demonstrated difficulties from claimant must be considered in determining the actual loss of use so long as loss of earning capacity is not considered. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420, 421 (Iowa 1994); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Notwithstanding suggestions to the contrary in the AMA Guides, this agency has a long history of recognizing that the actual loss of use which is to be compensated is the loss of use of the body member in the activities of daily living, including activities of employment. Pain which limits use, loss of grip strength, fatigability, activity restrictions, and other pertinent factors may all be considered when determining scheduled disability. Bergmann v. Mercy Medical Center, File Nos. 5018613 & 5018614, (App. March 14, 2008); Moss v. United Parcel Service, File No. 881576 (App. September 26, 1994); Greenlee v. Cedar Falls Community Schools, File No. 934910 (App. December 27, 1993); Westcott-Riepma v. K-Products, Inc., File No. 1011173 (Arb. July 19, 1994); Bieghler v. Seneca Corporation, File No. 979887 (Arb. February 8, 1994); Ryland v. Rose's Wood Products, File No. 937842 (Arb. January 13, 1994); Smith v. Winnebago Industries, File No. 824666 (Arb. April 2, 1991).

In this case, Dr. Rondinelli opined that claimant suffered a 62 percent impairment to the left leg. Dr. Sassman found several different ratable impairments (some of which the Guides do not allow to be combined). She combined the allowable ratable impairments to find a 27 percent whole person impairment. Unfortunately the rating is not converted to the left leg or left lower extremity.

Based upon the record before the agency, I find that the claimant's loss of use is more severe than the ratings suggested by the AMA Guides. The reality is, he has lost

nearly total use of his left leg as a result of the January 2012, work injury and subsequent amputation. I find that the restrictions provided by Dr. Sassman are more reflective of his actual abilities than the restrictions from Dr. Rondinelli. He is able to use a prosthesis, so his loss of left leg function is not total. He also has chronic pain (neuroma) around his stump. I find that his loss of function is 85 percent of his left leg, which entitles him to 187 weeks of benefits.

I note that I am not awarding any benefits for the claimant's symptoms of phantom pain, or his more recently developed back and hip pain. Those symptoms or conditions are deemed to not be permanent impairments as of the date of hearing and are not compensable either as industrial or functional disabilities.

The claimant is entitled to lifetime medical benefits for his conditions, including any sequelae and it is noted that Dr. Sassman did recommend that he consider further care for various issues. He is entitled to return to his treating physician should he desire such care.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay the claimant one hundred eighty-seven (187) weeks of permanent partial disability benefits at the stipulated rate of five hundred forty-eight and 54/100 dollars ($548.54) per week from the stipulated commencement date of April 9, 2013.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for weeks previously paid as stipulated.

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

Costs are taxed to defendants.

Signed and filed this 28th day of March, 2016.

JOSEPH L. WALSH
DEPUTY WORKERS'
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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.