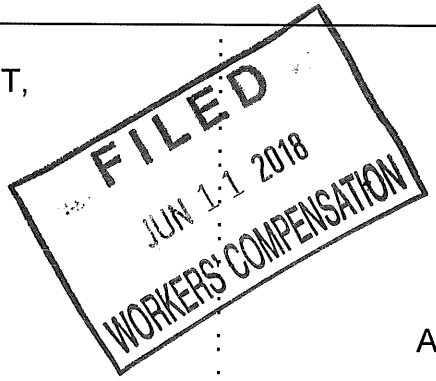
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



MATTHEW MACTAGGART, Claimant, vs. TLJ GRAIN, INC., Employer, and CONTINENTAL WESTERN GROUP, Insurance Carrier, Defendants.	File No. 5065004 ARBITRATION DECISION Head Note Nos.: 1803, 2502

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Matthew MacTaggart, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on May 1, 2017. Claimant alleged he sustained a work-related injury on January 4, 2017. (Original notice and petition)

For purposes of workers' compensation, TLJ Grain, Inc., defendant, is insured by Continental Western Group, defendant. Defendants filed their answer on March 27, 2017. They admitted the occurrence of the work injury. A First Report of Injury was filed on February 13, 2017.

The hearing administrator scheduled the case for hearing on May 3, 2018. The hearing took place in Des Moines, Iowa at 150 Des Moines Street. The undersigned appointed Ms. Buffy Nelson as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants elected not to call any witnesses.

The parties offered exhibits. Claimant offered an exhibit marked 2. Defendants offered exhibits marked A through E. The parties offered joint exhibit 1. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on or before May 17, 2018. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained a work-related injury on January 4, 2017 which arose out of and in the course of his employment;
3. The alleged injury is a cause of temporary disability during a period of recovery;
4. The parties agree if permanency is found, the permanency is a scheduled member disability to the (left lower extremity), left leg;
5. The parties agree, if a permanent work injury is determined, claimant reached maximum medical improvement on January 23, 2017;
6. The parties agree, the weekly benefit rate is $197.92;
7. Defendants have waived any affirmative defenses they may have had available; and
8. Medical benefits are not at issue.

ISSUES

The issues presented are:

1. Does claimant have a permanent partial disability to the left leg?
2. If so, to what extent is claimant's permanent partial disability?
3. Claimant seeks the cost of an independent medical evaluation pursuant to Iowa Code section 85.39; and
4. Claimant is requesting certain IME reports be charged as costs as well as other costs paid by claimant.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant at hearing, after judging his credibility, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

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

On January 4, 2017 claimant was walking at the plant when he stepped off a sidewalk and rolled his left ankle. Later in the day, claimant presented to the Gundersen Palmer Lutheran Hospital and Clinics in West Union, Iowa. (Joint Exhibit 1, page 1) X-rays of the left foot and ankle were taken. There were no fractures. (Jt. Ex. 1, p. 3) Christopher P. Peck, M.D. treated claimant in the emergency room. The diagnosis provided to claimant was:

> Sprain of ankle, unspecified laterally, unspecified ligament, initial encounter, left ankle, probably ATF tear.

(Jt. Ex. 1, p. 1)

Dr. Peck noted "a lot of soft tissue swelling." (Jt. Ex. 1, p. 1) An air cast was provided. Claimant was informed to rest his ankle and to use ice. (Jt. Ex. 1, p. 1)

On January 9, 2017, claimant visited with Chelsey E. Zitelman, APNP at the Family Medicine Clinic in Fayette, Iowa. (Jt. Ex. 1, p. 3) Claimant was advised to follow up at the hospital with his complaints. (Jt. Ex. 1, p. 4) The nurse practitioner did conduct a physical examination. She noted:

> Extremities: left ankle with moderate edema, ecchymosis surrounding heel and lateral malleolus. Musculoskeletal: gait is abnormal-limps when walking without crutches, decreased ROM in left ankle, limited ROM due to swelling and pain, pain with palpation of anterior lateral malleolus.

(Jt. Ex. 1, p. 7)

The clinical diagnosis for the left ankle was: "Sprain of calcaneofibular ligament of left ankle, subsequent encounter." (Jt. Ex. 1, p. 8)

The nurse practitioner made the following recommendations:

> -Recommend limited weight bearing for work; as well as light duty due to amount of walking/weight lifting patient does at plant every day. Did provide work excuse for patient today due to appt

-Increase frequency of Ibuprofen and incorporate Tylenol into pain regimen. Will not prescribe narcotics due to severe drug history.

-Ice frequently, elevate when able, ice often, and utilize ACE bandage in addition to air cast when walking.

-Provided Matt instructions on ROM ABCs to start working on. If no improvement within next week, recommend PT consult.

-Return to the clinic if symptoms persist or worsen. Patient understands and agrees with the treatment plan and will follow up as needed.

(Jt. Ex. 1, p.8)

Claimant returned to the hospital on January 18, 2017. (Jt. Ex. 1, p. 5) Ms. Vicki L. Novak, PA-C, treated claimant. The physician's assistant cleared claimant to return to work without any restrictions. The air cast was removed. Claimant was advised to wrap his ankle in an ace bandage and to take Ibuprofen for pain control. (Jt. Ex. 1, p. 5) Claimant reported his symptoms had greatly improved. (Jt. Ex. 1, p. 10) He desired to be cleared for work. (Jt. Ex. 1, p. 10)

Claimant did return to full duty work from January 23, 2017 through January 27, 2017. (Ex. C, p. 3) Claimant testified he voluntarily terminated his position because he was treated unprofessionally by members of management.

On February 20, 2017, claimant returned to see the physician's assistant. Claimant reported his ankle was mildly swollen and he experienced difficulties when he rotated his left ankle. (Jt. Ex. 1, p. 13) Claimant was not using any assistive devices and he could bear full weight. Ms. Novak found claimant's gait to be normal but there was mild lateral swelling of the left ankle. (Jt. Ex. 1, p. 15)

Effective June 26, 2017, claimant indicated he had intermittent pain in the left ankle. He did some roofing and the job aggravated his ankle. Claimant thought he could walk approximately 2 miles. However, it was difficult for him to walk on rough or uneven ground. He was unable to run, hop or jump. (Jt. Ex. 1, p. 17) At best, his pain level was 3 out of 10 on an analog scale. At its worst, the pain level was 7 out of 10. Claimant reported he was able to stand on his feet for up to 6 hours per day. (Jt. Ex. 1, p. 19)

On July 7, 2017, claimant was able to walk or jog on a treadmill for 6 minutes total with pain no greater than 2 out of 10. (Jt. Ex. 1, p. 26) Claimant reported on July 21, 2017, he was capable of performing masonry work without exacerbating his pain. (Jt. Ex. 1, p. 31) His ankle did not limit his ability to perform work tasks. (Jt. Ex. 1, p. 31)

Claimant testified when he exits a vehicle, he has a limp for 10 to 20 minutes. He also testified he then must sit on a couch, as pain runs down his left leg. Claimant

also testified to having issues with balance. At the time of the hearing, claimant was working as a welder at Featherlite in Cresco, Iowa. He testified he spends his day walking during his shift.

On September 6, 2017, Marc Hines, M.D., performed an independent medical examination pursuant to a request from claimant's counsel. Dr. Hines assessed claimant as having a sprain of the calcaneal fibular ligament of the left ankle. (Claimant's exhibit 2, page 33) Dr. Hines conducted a physical examination of claimant's station, balance, sensation, and deep tendon reflexes of the lower extremities. The evaluating physician opined in relative portion:

> In regard to deep tendon reflexes, the patient has 2 plus patellar and ankle reflexes in both lower extremities symmetrically. The strength is 5/5 in the lower extremities bilaterally. The patient's sensory examination is generally intact with the following exception. The patient does have some hyperpathia to pinprick just below the lateral malleolus. He also has tenderness in exactly the same area to palpation. I will mention at this time then that the patient's palpatory examination shows that while rotating his ankle, the patient has a very slight popping crepitus in this exact area with repeated motion. It is not always present. It is only intermittently present, but the interesting fact is that it is present just anterior and inferior to the lateral malleolus in the exact area where he has some slight hyperpathia to pinprick and where he has tenderness and where he has previously noted that he had the greatest degree of swelling with his injury. The patient additionally has lost about 5 degrees of dorsiflexion, plantar flexion, external and internal rotation of the left ankle in comparison to the right. He really has quite good movement in terms of its symmetry in all directions, but it is simply not quite as complete as the opposite side. In addition, it takes more energy to give complete rotation in all directions and in each direction than the opposite side, is clearly "stiffer." Despite this, the patient's gait examination shows that he is able to stand on each foot independently, equally and normally. The patient's gait examination reveals there is a very slight tendency for him to favor the right foot, but this is minimal and seems to vary, but generally is minimal. The patient's heel, toe and tandem gait are entirely within normal limits.

(Ex. 1, pp. 36-37)

With respect to permanency, Dr. Hines opined:

> I have used the fifth edition guides, the evaluation of permanent medical impairment. I have looked particularly at table 17-11 for ankle motion impairments. While there are impairments for mild impairment of plantar flexion and extension, the degree of impairment which he experiences is not such that this would be included in the guides. The patient does not have gait impairment sufficient to suggest an impairable

> dysfunction according to the guides. There are not sufficient sensory or pain abnormalities to suggest such dysfunction. In examining table 17-33, the ankle impairments for ligamentous instability, intraarticular displacement and fracture do not apply.

(Ex. 1, p. 37)

Dr. Hines did not impose specific restrictions. (Ex. 1, p. 37) However, the evaluating physician acknowledged claimant could have instability issues when standing on ladders. (Ex. 1, p. 38)

Counsel for claimant contacted Dr. Hines on or about October 13, 2017. On November 3, 2017, Dr. Hines reexamined the evaluation he had made of claimant's condition. (Ex. 1, p. 39) Without having examined claimant again, Dr. Hines changed his opinion. He wrote in part:

> ...Upon reconsideration of this patient's difficulties, it is clear that he has a permanent medical impairment and I have previously discussed the etiology and one restriction that the patient would have should most likely be handled through an FMLA paper for him to have intermittent needed time to be able to work off the ladder or take rest from the ladder when he has swelling or intermittent difficulties with his ankle and even may need short periods in which he is not able to work because of the ankle difficulty. This does intermittently swell and work abnormally. He does have difficulties with full and complete movement of the ankle. This causes difficulty with full support for him and a change in gait, which while it is minor, does cause an abnormality. The most similar difficulty that would apply to him would be the lower limb impairment due to gait derangement, table 17-5. Since his antalgic limp is intermittent as described even though subtle at the time that I visited with him, it is intermittently greater. I would give him a 5% whole person impairment rather than 7% and I do feel that this table can apply to this patient as we are not applying any other table in the guide despite some changes in range of motion and since the most significant problem for him is gait derangement.

(Ex. 1, p.39)

On March 20, 2018, Scott B. Neff, D.O., a Fellow of the American Academy of Orthopaedic Surgeons, examined claimant pursuant to a request from defendants for an independent medical examination. (Ex. B) Dr. Neff conducted a physical examination of claimant. In his report, Dr. Neff opined:

> Physical examination is performed in my professional office March 20, 2018. Mr. MacTaggart is unaccompanied to the examination. He is wearing tennis shoes or sneaker-type shoes and not boots.

> I observed him walking from the waiting area to the examining room, a distance of approximately 150 feet. His gait is normal and there is no obvious limp. He is examined seated and standing with his shoes removed.
>
> With him standing, he has slightly greater pes planus on the right side and the overall alignment of the left foot and ankle is normal. Heel valgus is normal. There is no calf atrophy. Seated exam on exam table shows normal range of motion of both knees. There is no atrophy in either lower extremity. There is no asymmetry in size, pretibial edema, or swelling. There is no sign of swelling in the left ankle. The right ankle dorsiflexes to 10 degrees and plantar flexes to 30 degrees. There is no varus laxity. The cotton sign for anterior instability on the right is negative. There is strong eversion on the right. The left ankle dorsiflexes to 5 degrees and plantar flexes to 30 degrees. Peroneal resisted eversion strength is 5/5 strength on the left. There is no abnormality to strength of palpation in the left tendo-Achilles. Cotton sign for anterior instability is negative. Comparing the right to the left side, there is a very slight varus laxity on the left, which is not present on the right. There is no significant posterior heel rotary instability. I do not appreciate or palpate a talar tilt with significant varus stress on the left ankle. Push-down strength is strong and eversion strength is strong. The peroneal tendons are well located behind the lateral malleolus. There is no tenderness over the peroneus brevis insertion or at the base of the 5th metatarsal. Heel rise is strong and symmetrical.
>
> Mr. MacTaggart shows bilateral symmetrical callus changes on both hands with thick, dense skin and ground-in dirt in the callus creases on the skin.
>
> He appears to have normal sensation over the lateral skin of the foot and ankle. Sometimes, with a significant inversion injury, traction injury to the sural nerve can occur, but I did not appreciate this to be present with this individual.

(Ex. B, pp. 2,3)

Dr. Neff expressed his opinion with respect to permanency. He opined in his report:

> ...Mr. MacTaggart, in my opinion, has had a significant lateral ankle sprain on the left involving the anterior, middle and posterior, talofibular ligaments and likely the calcaneal fibular ligament as well. Oftentimes, this type of ligament sprain in the ankle takes six to ten weeks to heal and oftentimes immobilization is recommended. Short-term immobilization with an Aircast was provided.

> Mr. MacTaggart shows normal motion and symmetrical motion comparing his right to left ankle. There is very mild varus laxity on the left compared to the right, which in my opinion does not require attribution of impairment. In my opinion, he does not need any permanent work restrictions; however, I would recommend that if he works in the manufacturing workplace, that he wears [sic] properly fitted, tall, lace-up or tie-type work boots. If indeed he gets his new job, there may be work requirements for specific footwear in the manufacturing workplace. In my opinion, he does not need any further medical treatment other than wearing good quality footwear, which would protect both of his ankles from injury in the workplace.
>
> Complex sprains such as he had, do require a [sic] six to ten weeks of healing, so I would attribute a ten-week healing period from the date of his injury of January 2017.

(Ex. B., pp. 3-4)

RATIONALE AND CONCLUSIONS OF LAW

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

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).

The undersigned accepts the rating of Dr. Hines as the most accurate depiction of claimant's left ankle/foot condition. Claimant does have an intermittent gait derangement. The intermittent gait derangement can affect claimant when he has to work on a ladder or on uneven ground. Dr. Hines relied on Table 17.5 of the AMA Guides to The Evaluation of Permanent Impairment, 5th Ed., because no other table was applied to claimant. Additionally, Dr. Hines only assessed a 5 percent impairment for gait derangement because the antalgic gait was intermittent and not continual.

Therefore, it is the determination of the undersigned deputy workers' compensation commissioner; claimant has a 5 percent permanent partial disability to the left foot. According to Iowa Code section 85.34(2)(n) claimant's disability is calculated as follows:

> 150 weeks X .05% equals 7.5 weeks of permanent partial disability benefits due to claimant at the stipulated rate of $197.92 per week.

The next issue is the matter of the payment for an independent medical examination pursuant to Iowa Code section 85.39. Iowa Code section 85.39, permits an employee to be reimbursed for a subsequent examination by a physician of the employee's choice when an employer-retained physician has previously evaluated "permanent disability."

Defendants maintain claimant did not follow the provisions of Iowa Code section 85.39. Moreover, claimant did not comply with the established holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015). Defendants are correct. Before an employer is required to pay for an independent medical examination of claimant's selection, the employer must first have obtained from a physician an impairment rating which gives rise to a belief by claimant that the employer-retained physician's rating is "too low." Claimant did not follow the specified procedures in Iowa Code section 85.39. Claimant obtained an independent medical examination from Dr. Hines prior to defendants obtaining a rating from a physician retained by them. Claimant is not entitled to be reimbursed for the IME. However, the preparation of the report in the amount of $750.00 will be taxed as a cost.

The final issue is costs to litigate. Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The following costs are assessed to defendants:

Filing fee	$100.00
Service fee	$26.20

Dr. Hines' report fee $750.00

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant seven point five (7.5) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of one hundred ninety-seven and 92/100 dollars ($197.92) and payable from January 23, 2017.

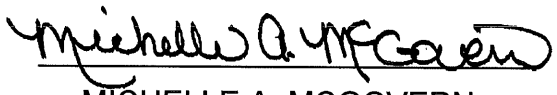
All past due benefits shall be paid in a lump sum together with interest as follows:

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be 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 (2) percent. See: Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Costs are assessed to defendants as detailed in the body of this decision.

Defendants shall file all reports as required by law.

Signed and filed this 11th day of June, 2018.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

James P. Hoffman
Attorney at Law
PO Box 1087
Keokuk, IA 52632
jamesphoffman@aol.com

Nathan R. McConkey
Attorney at Law
2700 Westown Pkwy., Ste. 170
West Des Moines, IA 50266-1411
nmcconkey@desmoineslaw.com

MAM/sam

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