BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAUL ALLEN,

Claimant,

vs.

PRAIRIE MEADOWS RACE TRACK & CASINO,

Employer,

and

EMCASCO INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5044185

APPEAL

DECISION

Head Note Nos.: 1802; 1803

Defendants Prairie Meadows Race Track & Casino and EMCASCO Insurance Company appeal from an arbitration decision filed June 20, 2014. The case was heard on June 9, 2014, and it was considered fully submitted at the conclusion of the arbitration hearing. The presiding deputy commissioner awarded claimant temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits for an injury the parties stipulated occurred on May 11, 2011. Defendants assert on appeal that claimant failed to prove by a preponderance of the evidence that he is entitled to TTD benefits or PPD benefits. Claimant asserts that the deputy commissioner's award should be affirmed. The parties stipulated that claimant's weekly workers' compensation benefit rate is $573.97. The detailed arguments of the parties have been considered and the record of the evidence has been reviewed de novo.

The first issue for consideration on appeal is whether the presiding deputy commissioner erred in his determination that claimant is entitled to TTD benefits from May 17, 2011, through July 14, 2011.

On May 11, 2011, claimant was bitten by a brown recluse spider while working in a barn for the employer. The location was described as "mechanical room in barn B-1." (Defendant's Exhibit C1) The injury arose out of and in the course of claimant's employment. Claimant finished working and reported the incident the following day, May 12, 2011. The employer immediately prepared an injury report and documented the events. (Def. Exs. C1 and C2) Claimant was immediately transported to Doctors Now, a preferred medical clinic used by the employer.

At the clinic, claimant saw Barbara White, D.O. Dr. White recited the history of claimant's spider bite. Dr. White gave clamant an injection to treat the spider bite. She prescribed three medications: clindamycin HCl, dapsone and Vicodin, although claimant denied using the Vicodin. Dr. White provided a work release for claimant to return to work without restrictions. (Cl. Ex. 2, p. 13) Claimant testified that Dr. White told him she was not allowed to take him off work pursuant to the instructions of the employer. The claimant was off work on May 13, 2011. That day he went to his family clinic for an unrelated problem and did not mention the spider bite incident. (Cl. Ex. 1, p. 1) The next date claimant was scheduled to work was May 15, 2011. Claimant worked that day.

On May 16, 2011, claimant called in sick to work. (Def. Ex. D10; Cl. Ex. 7, p. 38) He returned to the employer's clinic on May 17, 2011, and was seen by David Stilley, M.D. Dr. Stilley indicated claimant's symptoms had not improved. Claimant clearly expressed to Dr. Stilley that he did not feel well enough to work. Dr. Stilley clearly expressed the opinion that claimant was well enough to work and placed claimant on a very specific and reasonable treatment plan including the addition of Silvadene cream to his medications. (Cl. Ex. 2, pp. 14-15) Dr. Stilley then released claimant to work with restrictions to keep the wound clean and dry and wear bandages while working. (Cl. Ex. 2, p. 16) Claimant called in sick on May 17 and 18, 2011. (Cl. Ex. 7, pp. 38-39)

On May 20, 2011, claimant visited his family clinic to review the treatment plan from Doctors Now. Claimant saw Shelley J. Schossow, ARNP. (Cl. Ex. 1, p. 3) In her clinical note, Ms. Schossow stated she "agreed with the medications and treatments – no changes." (Cl. Ex 1, p.3) She also wrote claimant a slip to return to work on May 23. (Cl. Ex. 1, p. 7) However, on October 10, 2011, nearly five months later, Ms. Schossow drafted a "correction" to her May 20, 2011, clinical note. The "correction" stated: "patient was seen in this office on Friday, May 20, 2011, and was to remain off work until further notice."

Claimant did not return to work on May 23, 2011. He called in sick again. In fact, he continued to call in sick every day until he was terminated on May 25, 2011. (Cl. Ex. 7, pp. 41-45) On May 25, 2011, claimant returned to Dr. Stilley and complained of pain and diarrhea. (Cl. Ex. 2, p. 17) Claimant was provided the same restrictions of keeping the wound clean and dry and wearing a bandage. (Cl. Ex. 2, p. 20) A return appointment was scheduled for claimant with Dr. Stilley for June 2, 2011. (Cl. Ex. 2, p. 20)

Claimant was terminated by letter dated May 24, 2011, which he received on approximately May 25, 2011. The letter stated, "Since 5/16/11, you have been reporting off work. As of the date of this letter you have not provided doctor's documentation placing you off work, nor have you reported to work. Effective 5/24/11, your employment is terminated." (Cl. Ex. 6) Claimant testified that because he was terminated, he believed he was no longer allowed to see the company physician. He did not attend his follow-up appointment scheduled for June 2, 2011. Claimant did continue to call-in sick every day through July 14, 2011. (Cl. Ex. 7, pp. 42-73) During

this period of time claimant did not receive any medical care. He testified that he ritualistically cleaned the wound three times a day during this time frame.

Following the injury, claimant made very little effort to communicate with the employer. He failed to communicate why he was calling in sick to work. He failed to request time off work to specifically recover from the spider bite. The employer apparently made no effort to communicate with claimant. The employer did not contact claimant to confirm whether he was calling in due to his work-related spider bite. The employer did not send a letter warning claimant that his employment was in jeopardy for calling in sick as the employer had done on a previous occasion. (Def. Ex. D3)

Claimant was evaluated by Sunil Bansal, M.D., medical director of the Iowa Injury Institute on April 11, 2014. It was a one-time independent medical evaluation under Iowa Code section 85.39. Dr. Bansal determined claimant reached MMI on May 25, 2011. However, nowhere in his report does Dr. Bansal state claimant needed to be off work due to the injury, either before or after May 25, 2011.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App. 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In this case, Dr. Stilley, the authorized treating physician clearly indicated claimant did not need to be off work as of May 17, 2011. (Cl. Ex. 2, pp. 14-15 and p. 20). While Dr. Bansal states in his IME report that claimant reached MMI on May 25, 2011, nowhere in his report does Dr. Bansal indicate claimant actually needed to be off work before May 25, 2011. While claimant's personal provider, Shelley J. Schossow, ARNP, states in the "correction" dated October 10, 2011, to her clinical note and her medical excuse of May 20, 2011, that claimant "was to remain off work until further notice," the correction cannot be given much weight because it was issued nearly five months after the clinical note was issued and it clearly contradicts statements contained in both the clinical note and the work excuse issued on May 20, 2011, which statements were made contemporaneously with Ms. Schossow's evaluation and treatment of claimant. Furthermore, if Ms. Schossow had actually indicated to claimant on May 20, 2011, that he needed to remain off work "until further notice," one would have expected claimant to challenge the work excuse given to him by Ms. Schossow on May 20, 2011, which stated that claimant was able to return to work. (Def. Ex 1, p.7)

The deputy commissioner found claimant to be credible. Nothing in the record calls claimant's credibility into question. The record establishes that claimant testified honestly and sincerely, and that he actually believed he was not able to work from May 17, 2011, through July 14, 2011. However, the medical evidence clearly establishes

that claimant was mistaken in his belief that he was unable to work during the time in question. The correct legal standard is not what claimant might believe, but whether claimant was actually medically capable of returning to substantially similar employment. The medical evidence clearly establishes that claimant was medically capable of working throughout the time in question, notwithstanding claimant's testimony to the contrary. The credible medical evidence in the record, including claimant's own IME report from Dr. Bansal, does not provide any basis whatsoever for determining that claimant was unable to work from May 17, 2011, through July 14, 2011. Therefore, claimant has failed to carry his burden to prove he is entitled to TTD benefits, or healing period benefits.

The second issue for consideration on appeal is whether the presiding deputy commissioner erred in his determination that claimant is entitled to PPD benefits for the work injury of May 11, 2011.

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 categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. 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). Compensation for scheduled injuries is not related to earning capacity. 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).

Claimant has established a minor functional loss resulting from the spider bite. He has a permanent, quarter-sized scar on his left lateral calf at the site of the bite. At hearing, claimant testified regarding his ongoing symptoms from the spider bite. The deputy commissioner determined claimant did not embellish and he was credible. (Arb. Dec., p. 7) The evidence establishes claimant's symptoms are minimal but not negligible. The evidence establishes claimant generally has no symptoms when sitting, standing or walking, even when engaging in such activities for a prolonged time. He described a deep, burning sensation beneath the skin at the site of the scar when he flexes or extends his calf muscles. He mainly notices it when he climbs ladders which he does for his current job regularly. The pain does not prevent him from doing this activity but the evidence establishes that his injury did not fully heal.

There are two expert opinions. Dr. Bansal opined that the functional impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment was three percent of the left lower extremity. (Cl. Ex. 3, p. 28) Dr. Bansal described a condition called persistent dysesthesias in the area of the spider bite. "This cutaneous anesthesia is a documented finding." (Cl. Ex. 3, p. 28) He used Table 17-37 from the AMA Guides, Fifth Edition to rate claimant's impairment. This is a reasonable use of the AMA Guides. Dr. Stilley on May 29, 2014, opined the following. "It is my opinion, to a reasonable degree of medical certainty, that no permanent or lasting disability or impairment would result from an insect bite to his leg. His lack of follow up to our office prevents us providing documentation of resolution of his minor infection." (Cl. Ex. 2, p. 21)

It is undoubtedly true that Dr. Stilley's ability to evaluate the wound was hindered by claimant's failure to follow up with him after May 25, 2011. Nevertheless, the medical evidence does establish that claimant does have some level of a minor functional loss in his left leg. Claimant's credible description of the ongoing symptoms most closely aligns with Dr. Bansal's minimal rating of three percent. Therefore, I affirm the deputy commissioner's determination that claimant has suffered a three percent loss of function of his left lower extremity.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of June 20, 2014, is MODIFIED as set forth herein and that:

Claimant shall receive no temporary total disability benefits, or healing period benefits, for the work injury of May 11, 2011.

Defendants shall pay claimant six point six (6.6) weeks of permanent partial disability benefits at the rate of five hundred seventy-three and 97/100 dollars ($573.97) per week from May 12, 2011.

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

Defendants shall pay the costs awarded in the arbitration decision and the parties shall each pay one half of the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 3rd day of April, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies to:

James B. Neal
Attorney at Law
6611 University Ave., Ste. 200
Des Moines, IA 50324
jneal@smalaw.net

Jane V. Lorentzen
Attorney at Law
2700 Grand Ave., Ste. 111
Des Moines, IA 50312-5215
jlorentz@hopkinsandhuebner.com