BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CONNOR YOUNG,

Claimant,

vs.

THE DRILLER, LLC,

Employer,

and

TRAVELERS CASUALTY AND SURETY COMPANY,

Insurance Carrier,
Defendants.

File No. 5064332

ARBITRATION DECISION

Head Note Nos.: 1802, 1803

STATEMENT OF THE CASE

Connor Young, claimant, filed a petition in arbitration seeking workers' compensation benefits from his employer, The Driller, LLC, and Travelers Casualty and Surety Company, the insurance carrier, as defendants. The matter proceeded to hearing on June 26, 2019. The parties submitted post-hearing briefs and the matter was considered fully submitted on July 3, 2019.

The evidentiary record includes: Joint Exhibits JE1 through JE4; Claimant's Exhibits 1 through 6; and Defendants' Exhibits A through J. Claimant provided testimony at hearing.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties agree that claimant was paid 55 weeks of permanent partial disability as a result of the May 14, 2018 arbitration decision, based on the October 3, 2016 date of injury. Claimant has apparently not been paid any additional permanent partial disability benefits for the April 14, 2017 work injury that is the basis of the petition in this matter. (Hearing Report)

The parties agree that claimant's applicable rate in this matter is $488.27.

ISSUES

The parties submitted the following disputed issues:

1. Whether the stipulated work injury of April 14, 2017, is the cause of temporary partial disability, from the period of June 19, 2018 through the present.

2. Whether the alleged injury is the cause of permanent disability and if so, whether the injury is limited to a scheduled member or invades the body as a whole and the extent thereof.

3. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

The claimant, Conner Young, was 21 years old at the time of the hearing.

Claimant is a high school graduate. He had some college courses at Des Moines Area Community College (DMACC), but did not receive a degree.

Claimant's great grandfather founded the defendant company, The Driller, LLC, where claimant worked at the time of the injury that is the subject of his petition in this matter. However, claimant's family no longer owns the company. Claimant started working for The Driller, LLC in high school on a part-time basis and continued to work thereafter attending DMACC. The company engages in directional boring, drilling and installing underground pipes. Claimant described the work as hard physical labor, which often occurred on uneven surfaces.

On April 14, 2017, claimant was working for the defendant employer. On that date, he was stepping off an excavator when his "[f]oot slipped off [a] step due to dirt clod moving," and his "[a]nkle did not have enough strength to support [his] body weight due to [his] previous injury." (Exhibit 5-30) He was asked why the injury happened and stated that in addition to the excavator having poor footing and dirty tracks on the excavator, that he "felt like [his] ankle strength was a problem due to previous injury." (Ex. 5-31) Claimant had a prior significant laceration and crush injury to his right lower leg on October 3, 2016. (Ex. JE2-1, 2)

Claimant testified that he had never had ankle or back issues before 2017. However, I note that claimant testified in the prior May 14, 2016 hearing that he was walking with a limp in January 2017. (Ex. C-6)

After the April 14, 2017 incident, claimant reported the injury to his employer and went to the emergency room the following day. He was diagnosed with a right ankle sprain. (Ex. JE1-1, 5) It was suggested that claimant follow-up with a specialist, Scott Honsey, M.D. (Ex. JE1-3, 5)

On April 18, 2017, claimant was seen at the University of Iowa Hospitals and Clinics by Phinit Phisitkul, M.D. (Ex. JE2-1) However, this appointment was related to claimant's prior work injury from October 3, 2016. Claimant had ongoing treatment for continued pain and swelling regarding this prior injury. (Ex. JE2-2)

On May 25, 2017, Dr. Phisitkul noted that claimant's "prior ankle sprain has improved but [is] still painful on the lateral side," and that claimant "continues to walk with a limp." (Ex. JE2-3) Claimant was not working under any restrictions at that time. (Ex. JE2-3, 4)

Claimant continued to have leg pain from his October 2016 injury while working, running, carrying and lifting. (Ex. JE2-4) On September 27, 2017, claimant was assigned a 22 percent permanent impairment of the right lower extremity for this prior injury. (Ex. JE2-6, 7) This was based in part on loss of strength in ankle plantarflexion. (Ex. JE2-6) The loss of strength and the entire impairment rating was "[b]ecause of his extensive right lower extremity crush injury." (Ex. JE2-6)

On April 25, 2017, claimant attended physical therapy at 21st Century Rehab. (Ex. JE3-1) The therapist discussed both the October 3, 2016 crush injury and the recent right ankle sprain of April 14, 2017 from stepping on a "dirt mound at work 1.5 weeks ago." (Ex. JE3-1) His right ankle was bruised and swollen. Claimant described his difficulties in standing, squatting and balance on uneven ground "resulting in recent sprain to [the] injured leg." (Ex. JE3-1)

On October 2, 2017, claimant was seen by Dr. Honsey. (Ex. JE4-1) The reason for the visit was stated as: "Leg injury (a year ago) and [l]eg [s]welling (having issues with since)." (Ex. JE4-1) The active problems regarding his physical condition were noted to be: a crush injury to the lower right leg; and pain in the right lower leg. There is no specific mention of right ankle pain or problems. This, along with the reference to the prior injury from "a year ago," relate this visit to the October 3, 2016 crush injury, not the April 14, 2017 ankle incident. (Ex. JE4-1) In fact, it is specifically stated that "Connor is in today to follow-up his crush injury to his leg. This happened almost exactly a year ago on October 3, 2016." (Ex. JE4-2) Dr. Honsey also noted that claimant was "having some hip pain as well because he continues to have a bit of a limp from the injury," referring to the October 3, 2016 injury. (Ex. JE4-2)

On March 1, 2018, Sunil Bansal, M.D., issued an independent medical evaluation (IME) report following an evaluation performed at the request of claimant's counsel. (Ex. B) Dr. Bansal discussed claimant's condition at the time of the evaluation. He described swelling in his calf and increased pain with lifting, prolonged standing, ankle instability on uneven surfaces, and difficulty with crawling and kneeling. (Ex. B-2)

Claimant stated that his "ankle does not usually hurt, but if he has it in an awkward position it is painful." (Ex. B-2) He reported spraining his ankle twice in the past year, but did not mention the April 14, 2017 incident specifically. Dr. Bansal opined that the October 3, 2016 crush injury to claimant's right lower extremity caused "pain and weakness to his lower extremity (assessed by multiple examiners) [which] has led to a chronic altered gait with sacroiliac joint sequalae." (Ex. B-5, 6) Dr. Bansal assigned permanent impairment ratings of: 5 percent to the lower extremity for the right knee; 3 percent to the whole person for the back; and 21 percent to the lower extremity for the right ankle. (Ex. B-6) Dr. Bansal assigned permanent restrictions regarding limiting kneeling, bending, squatting, climbing, or twisting, standing/walking, multiple stairs, ladders and uneven terrain. Dr. Bansal does not indicate whether the restrictions are needed due to the knee, back or ankle condition, but states the restrictions generally.

On May 24, 2018, this agency issued an arbitration decision following a hearing regarding the October 3, 2016 crush injury to claimant's right leg. (Ex. A) Issues presented at hearing included whether the injury was limited to a scheduled member or include the whole body, and the extent of any permanent disability. The deputy discussed the original October 3, 2016 crush injury, and the April 14, 2017 ankle sprain. (Ex. A-2, 4) The deputy found that the complaints of limping appear in the records after the April 14, 2017 ankle sprain and that claimant "was able to walk but 'with difficulty.'" (Ex. A-4, 5) However, the deputy found that claimant failed to connect the April 14, 2017 ankle sprain to the original October 3, 2016 injury, by failing to produce a clear expert opinion linking these conditions. (Ex. A-5) The deputy therefore concluded that claimant's altered gait and back complaints were not related to his October 3, 2016 work injury. However, the deputy went on to find that even if the ankle sprain was related to the October 3, 2016 injury, that the medical records did not support a finding of permanency associated with the back condition. This conclusion was based on Dr. Bansal's statement about the commencement of the back complaints, which conflicted with the medical records, and Dr. Chen's (a spinal cord injury specialist) assessment of claimant's condition that noted no abnormal findings regarding claimant's back. (Ex. A-6) The deputy noted that Dr. Chen's report was consistent with claimant's lack of any request or receipt of any treatment for his back or hips during his course of treatment. (Ex. A-7) The deputy therefore found that claimant's October 3, 2016 injury was limited to his leg, and did not involve the body as a whole, and disregarded Dr. Bansal's opinion because he failed to consider what the deputy found to be a significant temporal connection between claimant's April 2017 ankle sprain and the commencement of claimant's limp and altered gait. The deputy awarded 25 percent lower extremity impairment, which was 55 weeks of permanent partial disability benefits.

On May 28, 2018, claimant gave written notice to his employer that he was quitting to take another job. (Ex. E-1) He stated that he was leaving for better pay and benefits, less travel, more consistent hours and "less stress on [his] leg." (Ex. E-1) There was no mention of any back pain. Claimant testified that he took the job at the Iowa Department of Transportation, for better pay, more regular hours, less overnight travel, and better benefits, including IPERS. He also testified that he took the job because it was easier on his leg/ankle. Although I note that claimant's total annual

salary may have decreased because of the large amount of overtime claimant worked for the defendant employer, I find the primary motivating factors for the job change were the increased pay, benefits and better hours. I also note that claimant had been working without restrictions concerning the ankle injury for the defendant employer when he tendered his resignation.

On July 2, 2018, claimant filed this pending matter asserting an injury to the right ankle, back and hips as a result of the April 14, 2017 ankle sprain incident.

Claimant returned to see Dr. Honsey on September 27, 2018. (Ex. JE4-4) Claimant had not seen Dr. Honsey since October 2017, nearly one year earlier. He was seen for left lower back pain that "started a year ago" and ankle pain, complaining that he "rolls it all the time." (Ex. JE4-4) Dr. Honsey stated that claimant has a history of "a serious injury back in 2016," and he has healed from that injury, but "still has some significant disability" with "weakness of his dorsiflexors and plantar flexors of the right foot." (Ex. JE4-6) Dr. Honsey stated that "[h]e is no longer able to do construction type work because of the persistent weakness." (Ex. JE4-6) Dr. Honsey then contradicts his prior statement by stating that claimant's back pain developed "over the last few months," rather than "a year ago" as stated above. (Ex. JE4-6) Dr. Honsey's exam revealed weakness of dorsiflexion and plantarflexion. He stated "I do not believe this is due to radicular injury but more the injury itself to the lower calf," and "[o]n the right there is obvious deformity in the medial portion of the calf due to the injury," referencing the prior crush injury. (Ex. JE4-6) Therefore, it would appear that Dr. Honsey relates claimant's ankle condition to the October 3, 2016 original work injury and not the April 14, 2017 ankle sprain. Dr. Honsey recommended a three quarter lace up boot to help prevent future ankle sprains. (Ex. JE4-6) Dr. Honsey does not offer a specific causation opinion for the back pain, makes contradictory statements as to its origin and appears to relate the ankle problems to the original injury, not the April 14, 2017 incident.

On February 11, 2019, Robert Rondinelli, M.D., issued a letter to claimant's counsel following an independent medical evaluation (IME) on February 7, 2019, performed at the request of claimant's counsel. (Ex. 1) Dr. Rondinelli acknowledged that at the time of the ankle sprain, claimant was "experiencing ongoing foot pain from his right knee to his ankle, as a result of his earlier injury to the right leg," but noted that he "continued working full duty with no restrictions in spite of this." (Ex. 1-2) He diagnosed claimant with "an acute sprain to his right ankle in a work-related injury dated April 14, 2017," which aggravated his: right ankle pain; secondary right hip pain, with loss of motion and mild gait dysfunction; and right-side sacroiliac dysfunction and mechanical lumbosacral pain. (Ex. 1-4)

Dr. Rondinelli opined that claimant's right hip pain and loss of motion as well as his right-sacroiliitis are associated with mild gait dysfunction arising secondarily out of pre-existing and resulting gait dysfunction associated with his right ankle dynamic instability from the sprain and residual impairments due to the original crush injury of October 3, 2016. (Ex. 1-5) Dr. Rondinelli opines that both the October 3, 2016 crush injury and the April 14, 2017 ankle sprain play a part in claimant's gait disturbance and

right hip/back condition. However, he does not indicate whether the April 14, 2017 ankle sprain was a "substantial" factor in bringing about the result. Further, he stated that the medical records indicate that claimant "had persisting symptoms of pain, weakness and gait instability before, during and after he sprained his ankle at work on April 14, 2017." (Ex. 1-5) Dr. Rondinelli acknowledges claimant had a "progressive gait dysfunction" but does not provide sufficient discussion of how or why the April 14, 2017 ankle sprain was a substantial factor in lighting up that condition.

Dr. Rondinelli does not believe that claimant has reached maximum medical improvement (MMI) concerning the April 14, 2017 ankle sprain injury. (Ex. 1-6) However, he stated that claimant's "preliminary WPI [whole person impairment] estimate for his work-related ankle sprain and sequelae from April 14, 2017 is 12% WPI." (Ex. 1-7)

On June 19, 2019, David T. Berg, D.O., of Methodist Occupational Medicine issued a report following an IME, performed at the request of defendants. The examination included a review of pertinent medical records from October 3, 2016 through September 27, 2018. (Ex. J) Dr. Berg noted claimant had a new job with the State of Iowa Department of Transportation as a highway technician, working primarily as an inspector. (Ex. J-3) Claimant's "chief complaint" was weakness and instability of his right ankle, although he reported no ankle pain. (Ex. J-3) Claimant described a feeling that when he was on uneven terrain his ankle might give out and roll/sprain again.

Concerning his low back, claimant told Dr. Berg that he did not have any pain at that time and "only experiences low back pain when exercising." (Ex. J-3) When the pain occurs it is in the "right greater than left SI joint area," without radiculopathy. (Ex. J-3) Significantly, Dr. Berg noted that claimant ambulated "with a normal gait through the clinic and out to the parking lot to his car." (Ex. J-4) Claimant had full passive and active range of motion of the lumbar spine, but had pain in the right SI joint with lumbar extension particularly combined with right side-bending and rotation; and negative straight leg raise testing. (Ex. J-4) Dr. Berg discussed claimant's crush injury of 2016 and his April 2017 ankle sprain. (Ex. J-5) He stated that the type of ankle sprain claimant had, which was an inversion injury, meaning the foot rolled to the inside, involves potential injury to four ligaments that are sequentially damaged based on the severity of the injury. In other words, the more severe the ankle injury, the greater number of these four ligaments will sustain injury. The first to be injured in an inversion ankle sprain is the anterior talofibular (ATF), which is the only ligament that was injured in claimant's ankle sprain. However, Dr. Berg still described claimant's injury as a grade 2 to 3 level sprain, based on a scale from 1 to 3, with 3 being the most severe. He also stated that the ATF injury is responsible for his feeling that the ankle is going to roll again, and is "also responsible for a great deal of his lower extremity pain as the joint is actually loose," and continued physical activity involving this loose joint results in pain. (Ex. J-6) Claimant was also noted to have pes planus deformity (flat feet) and valgus

deformity on the right foot. Dr. Berg stated that people with these combined deformities tend to place a "great deal of stress on the medial aspect of the ankle and foot." (Ex. J-6)

Dr. Berg opined that claimant's "right hip, leg and back symptoms are purely biomechanical and originate from the pes planus deformity and hind foot valgus deformity of the right foot." (Ex. J-9) He noted that this biomechanical dysfunction was not considered by Dr. Bansal or Dr. Rondinelli. (Ex. J-9) He further opined that the ankle sprain did not result in a material aggravation or exacerbation of his pre-existing hip or lower extremity dysfunction, and that if claimant does not want to pursue additional physical therapy, he would be at MMI and assigned a 5 percent permanent impairment to the right lower extremity based on laxity of the anterior talofibular ligament. (Ex. J-9)

Considering the expert opinions concerning causation, I find that Dr. Bansal opined that the chronic altered gait was due to the October 3, 2016 crush injury, although as the deputy pointed out in the previous arbitration decision, Dr. Bansal did not appear to consider the relationship between the April 14, 2017 ankle sprain and the commencement of claimant's report of limping. Nevertheless, he did not find the altered gait or back condition to have been caused by the April 14, 2017 ankle sprain injury, which occurred more than one year before the previous arbitration hearing. (Ex. B-5, 6) I find that Dr. Honsey stated that the ankle weakness was due to the October 3, 2016 crush injury, and he did not offer a specific causation opinion concerning the back or hip complaints. (Ex. JE4-6) I find that Dr. Rondinelli opined that the April 14, 2017 ankle sprain and its effect on the right hip and right sacroiliitis was an aggravation of a pre-existing condition, and not the origin of the gait disturbance, but it is unclear if the ankle sprain was a "substantial" factor in bringing about the result. (Ex. 1-5) I find that Dr. Berg opined that claimant's right hip, leg and back complaints were not caused by the April 14, 2017 ankle sprain.

I note that only Dr. Rondinelli opines that the April 14, 2017 injury was an aggravation of an underlying condition. I find that the greater weight of the medical evidence in this case does not support a finding that the April 14, 2017 work injury is the cause of claimant's hip or back condition. I further find that there is insufficient evidence to show that the April 14, 2017 ankle sprain was a substantial factor in the aggravation of any underlying condition.

I find that the experts agree that claimant sustained an injury to his ankle on April 14, 2017, but that the injury is limited to his left lower extremity and does not extend to the whole person.

Considering the extent of permanent impairment, I find that claimant sustained five percent impairment to his right leg based on the opinion of Dr. Berg. Dr. Rondinelli's assessment of impairment includes assessment of quadriceps weakness, right hip pain and range of motion, and back pain. Having found above that claimant has failed to establish a whole body injury, I disregard Dr. Rondinelli's

assessment of permanent impairment because it takes into significant consideration, the hip and back components.

Considering temporary partial disability, on May 25, 2017, Dr. Phisitkul noted that claimant was not working under any restrictions at that time. (Ex. JE2-3, 4) This injury occurred on April 14, 2017. Claimant had returned to work at the same employer with no restrictions and therefore returned to substantially similar employment.

CONCLUSIONS OF LAW

1) Whether the stipulated work injury of April 14, 2017, is the cause of temporary partial disability, from the period of June 19, 2018 through the present.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

In this case, claimant argues that he is entitled to a running award of temporary partial disability. However, I have found above that claimant returned to substantially similar work when he returned to his prior employment after the April 14, 2017 ankle sprain and he is therefore not entitled to temporary partial disability. The fact that claimant later chose a different job that was less physically demanding and had better hourly pay, benefits, and more consistent work hours, does not negate the fact that he remained medically capable of doing a substantially similar job to the one that he was performing at the time of the injury.

2) Whether the alleged injury is the cause of permanent disability and if so, whether the injury is limited to a scheduled member or invades the body as a whole and the extent thereof.

The parties generally agree that the April 14, 2017 ankle sprain resulted in permanent impairment, but disagree whether that permanent impairment involves the leg only or the whole person.

Claimant argues that collateral estoppel/issue preclusion prevents defendants from arguing that this injury involves the leg only. Claimant argues that causation of the back and hip condition was determined in the May 24, 2018 arbitration decision to be caused by the April 14, 2017 injury.

Issue preclusion involves four elements:

> (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and, (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Comes v. Microsoft Corp., 709 N.W.2d 114, 118 (Iowa 2006).

In the May 24, 2018 arbitration decision, the issue presented was whether the October 3, 2016 crush injury was limited to the leg, or included the body as a whole. The deputy determined that the October 3, 2016 injury was limited to the leg. In support of this conclusion, the deputy noted that the medical records did not indicate claimant was limping until after the April 14, 2017 injury, even though claimant testified he was limping in January 2017. Nevertheless, the deputy stated in dicta that claimant's limping was attributable to the April 2017 ankle sprain. The deputy did not specifically conclude that the April 2017 ankle sprain was the cause of the hip and back complaints, and specifically concluded that the medical records did not support a finding of any permanent injury concerning the back complaint. (Ex. A-5)

More importantly, the issue of whether the ankle sprain from April 14, 2017 was the cause of an injury to a scheduled member or the whole body was not an issue for determination by the deputy. It was not necessary for the deputy to reach a determination whether the April 14, 2017 ankle sprain resulted in injury to the leg or whole body to dispose of the issue concerning the October 3, 2016 injury. Although, it may have been relevant, it was not material to the determination. Finally, there was no final determination that the April 14, 2017 was a whole body injury, merely that the complaints of limping were attributable to the April 14, 2017 incident.

I conclude that claimant's argument of collateral estoppel/issue preclusion fails.

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 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):

> The 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 v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); 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 Coal Mining 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).

In this case I have found above for the reasons there stated that claimant has sustained a 5 percent permanent impairment to the right leg as a result of the April 14, 2017 work injury. Five (5) percent of the leg is 11 weeks of permanent partial disability benefits.

3) Costs.

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Claimant does not make a claim that the expense for Dr. Rondinelli is recoverable under Iowa Code section 85.39, which is therefore not considered. Therefore, the expense of Dr. Rondinelli's evaluation and report are viewed only as a possible cost under rule 876 IAC 4.33, which would allow only for the reimbursement of the report and exclude the actual physical examination pursuant to Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015). Unfortunately, Dr. Rondinelli's invoice does not break down the amount of time involved for the report versus the examination. The invoice does, however, indicate that the physical exam, record review and report combined took 13 hours and 45 minutes to complete at a rate of $500.00 per hour, which is a total of $6,875.00. However, Dr. Rondinelli stated in the History and Physical attached to the IME report, that he spent approximately 1 hour and 45 minutes in a face-to-face interview and examination of claimant. Based on his billing rate of $500.00 per hour, I conclude that Dr. Rondinelli's report and invoice reflect an amount of $875.00 attributable to the examination, with the balance of $6,000.00 attributable to the preparation of the report.

Defendants make no argument on the issue of costs.

I determine that defendants shall pay costs as follows: 1) filing fee - $100.00; 2) Ciox Invoice for Medical Records - $22.00; 3) Sweeney Court Reporting - $97.50; and 4) Dr. Rondinelli's report - $6,000.00. Costs total $6,219.50.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant permanent partial disability benefits of eleven (11) weeks, beginning on April 14, 2017 until all benefits are paid in full.

All weekly benefits shall be paid at the stipulated rate of four hundred eighty-eight and 27/100 dollars ($488.27) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten 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 percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

Defendants shall pay costs in the amount of six thousand two hundred nineteen and 50/100 dollars ($6,219.50) as outlined above.

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 1st day of August, 2019.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/srs/kjw

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.