BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KYLE RANKIN, Claimant, vs. ANDERSON ERICKSON DAIRY, Employer, and TRAVELERS INDEMNITY CO. OF CT. Insurance Carrier, Defendants.	FILED NOV 13 2015 WORKERS' COMPENSATION File No. 5053015 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Kyle Rankin, the claimant, seeks workers' compensation benefits from defendants, Anderson Erickson Dairy, the employer, and its insurer, Travelers Indemnity Company of Ct., as a result of an alleged injury on April 30, 2014. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on October 12, 2015, but the matter was not fully submitted until the receipt of the parties' briefs and argument on October 16, 2015. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4".

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On April 30, 2014, claimant received an injury arising out of and in the course of employment with defendant employer.

2. Claimant is not seeking additional healing period benefits.
3. The work injury of April 30, 2014, is a cause of some degree of permanent, scheduled member disability to the right leg.
4. Permanent partial disability benefits commence on October 25, 2014.
5. At the time of the alleged injury, claimant's gross rate of weekly compensation was $1,001.00. Also, at that time, he was married and entitled to 3 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $641.88 according to the workers' compensation commissioner's published rate booklet for this injury.
6. Medical benefits are not in dispute.
7. Defendants agreed to reimburse claimant for the cost of the medical examination by Jacqueline Stoken, D.O.

After hearing, the parties agreed in email communications to me that claimant was paid 4.4 weeks of permanent partial disability benefits prior to hearing. They also agreed that a letter from defendants to claimant, Ex. 2-1, stating he was only paid 4 weeks is incorrect.

ISSUES

The only issue submitted by the parties for determination is the extent of claimant's entitlement to weekly, permanent disability benefits.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Kyle, and to the defendant employer as AE.

Kyle, age 52, has worked for AE, a producer of dairy products, for the last 26 years as a factory laborer. At the time of his April 2014 work injury, he was performing the job of vat room cleanup.

The stipulated injury involves the right knee. The injury occurred when Kyle was stepping down a flight of stairs after cleaning a wet floor. He slipped and skidded down the stairway landing on his legs and suffered an onset of pain in both knees. However, the initial pain subsided to some extent and he did not seek treatment. However, 5-6 weeks later, his right knee did not improve and he sought treatment. Defendants sent him to an occupational physician who ordered an MRI. When the MRI revealed a meniscus tear in the right knee, defendants referred Kyle to Craig Mahoney, M.D., an

orthopedic surgeon. Dr. Mahoney had previously treated Kyle for a meniscus tear in the left knee.

Kyle was previously surgically treated for an ACL tear in the right leg in 1997. He states that the meniscus was not affected by this injury. There are no records in evidence to suggest otherwise.

Dr. Mahoney treated Kyle's right knee injury with surgery. A surgical report is not in evidence, but according to Jacqueline Stoken, D.O., who rendered a disability opinion in this case, surgery consisted of a right partial medial meniscectomy; a medial compartment and patellofemoral compartment chondroplasty; and, a plica excision and synovectomy of the suprapatellar region in the notch. (Ex. 3-5)

Although Dr. Mahoney noted continued symptoms, he placed Kyle at maximum medical improvement on December 5, 2014, and released him from his care along with a release to return to full duty without permanent restrictions. (Ex. 1-7) Dr. Mahoney filled out a form sent to him in December 2014 by defendants' adjuster in which the doctor provided a permanent impairment rating of 2 percent to the right knee. (Ex. A) Dr. Mahoney neither specified how he arrived at that rating, nor stated what, if any, impairment rating guides he may have used for the rating.

At the request of his attorney, Kyle's right knee injury was evaluated, as stated above, by Dr. Stoken. Dr. Stoken indicates in her lengthy report that she reviewed all of the medical records involved in treating this injury. She also asked Kyle to complete a pain assessment questionnaire, a patient history and a functional assessment questionnaire. (Ex. 3-14) Kyle testified that she took measurements of his knee function. Dr. Stoken opines that Kyle has a 10 percent permanent partial impairment to the right lower extremity under the AMA Guides for the Evaluation of Permanent Impairment, fifth edition, due to right knee flexion contracture. The doctor also recommends permanent restrictions to avoid repetitive bending, twisting, stooping and crawling. (Ex. 3-5)

Kyle admits that Dr. Mahoney also took measurements and that he did not discuss with Dr. Stoken his baseline range of motion prior to his right knee injury in this case. Defendants' adjuster asked Dr. Mahoney to review his office records and the report of Dr. Stoken and reply to Dr. Stoken's impairment rating. The doctor states that notes of his examination of Kyle did not show any flexion contracture and it could be possible Kyle sustained another injury to his leg that could have caused this contracture.

At hearing, Kyle testified that his job involves all of the activities he is to avoid according to Dr. Stoken, and he continues to perform these activities at the present time and works the same number of hours each week. However, he states that he does those activities at a much slower pace. He adds that he aches daily from his physical activity, especially prolonged sitting and standing. He also has a problem sleeping with

his continued knee pain. He also has limited his activities. He no longer rides a bike and no longer performs the gym work that he did before his knee injury.

I find the work injury of April 30, 2014, is a cause of a 10 percent loss of use to the right leg. There is no evidence of any other injury to the right leg since Kyle last saw Dr. Mahoney. Dr. Stoken specifically states that she used the AMA Guides, fifth edition, adopted by this agency as a guide for rating impairments. 876 IAC 2.4. Dr. Mahoney did not state he used any guide in making his rating. Also, Dr. Stoken's physical examination was over six months after Dr. Mahoney's last office visit with Kyle and after six months of full duty work at AE. Consequently, Dr. Stoken's findings are more descriptive of Kyle's current right knee disability. Also, Dr. Stoken's rating is more consistent with Kyle's description at hearing of his continued right knee problems. From his demeanor at hearing, Kyle appeared sincere and truthful in his testimony. Kyle simply has not retained 98 percent of the use of his right leg as opined by Dr. Mahoney.

Claimant's demeanor was a substantial factor in rendering my findings in this case.

CONCLUSIONS OF LAW

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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v.

Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). 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).

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

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):

> [t]he 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, 331 N.W.2d 116; 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 C. M. 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).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598 (1936).

On the other hand, industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man." Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Also, this agency is not limited to use of the AMA Guides. Lay testimony and demonstrated difficulties from claimant must also 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).

In this case, the parties agreed in the hearing report that any disability from the work injury of April 30, 2014, is limited to the schedule set forth in Iowa Code section 85.34(2)(o). I found that claimant suffered a 10 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 22 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(o), which is 10 percent of 220 weeks, the maximum allowable number of weeks for an injury to a leg in that subsection.

ORDER

THEREFORE IT IS ORDERED:

1. Defendants shall pay to claimant twenty-two (22) weeks of permanent partial disability benefits at the stipulated rate of six hundred forty-one and 88/100 dollars ($641.88) per week from the stipulated commencement date of October 25, 2014. Defendants shall receive a credit for the 4.4 weeks previously paid.

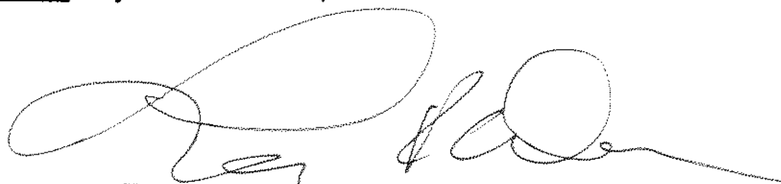
2. Defendants shall pay accrued weekly benefits in a lump sum.

3. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

5. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 13th day of November, 2015.



LARRY P. WALSHIRE
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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.