BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEREMY FLAHERTY,

Claimant,

vs.

VAN WYK, INC.,

Employer,

and

TRAVELERS,

Insurance Carrier,
Defendants.

File No. 5060733

ARBITRATION DECISION

Head Note Nos.: 1803

STATEMENT OF THE CASE

Claimant, Jeremy Flaherty, filed a petition for arbitration seeking workers' compensation benefits from Van Wyk, Inc., the employer and Travelers, the insurance carrier.

The matter came on for hearing on May 20, 2019, before deputy workers' compensation commissioner, Joseph L. Walsh, in Des Moines, Iowa. The record in the case consists of Claimant's Exhibit 1; Defense Exhibits A through E; Joint Exhibits 1 through 5; as well the sworn testimony of claimant, Jeremy Flaherty. Amy Pederson was appointed as the court reporter for the proceedings. Both attorneys did an excellent job of narrowing the issues and appropriately limiting the record to probative exhibits. The parties briefed this case and the matter was fully submitted on May 29, 2019.

ISSUES AND STIPULATIONS

The following issues and stipulations were submitted. All of the stipulations have been accepted by the agency and are deemed binding at this time.

It is stipulated that claimant suffered an injury to his left leg which arose out of and in the course of employment on July 30, 2015. The only disputed issue is whether this injury resulted in any permanent disability, and if so, the extent of functional

disability. It is stipulated that if the claimant is entitled to permanent disability benefits, the disability is scheduled (left leg). The defendants dispute that claimant has suffered any permanent disability. The parties have stipulated the commencement date for any permanent disability benefits.

FINDINGS OF FACT

Jeremy Flaherty was born in 1974 and is a resident of Kansas. He appeared at hearing with his wife, Bobbi. He testified live and under oath at hearing. His answers were short and concise. His demeanor was matter-of-fact. I find his testimony to be highly credible. He did not appear to embellish or exaggerate his testimony.

Mr. Flaherty has been a truck driver for approximately the past five years. In 2015, he worked for Van Wyk as an over-the-road tractor trailer driver. On July 30, 2015, he suffered an injury which arose out of and in the course of his employment with Van Wyk. On that date, while walking through a truck stop parking lot, he stepped on some type of uneven ground and broke his left ankle. He was seen the same day at Doctors Now in Altoona, Iowa, where he was evaluated by Luke Perrin, M.D.

> The patient presents with a chief complaint of constant joint pain of the left ankle since Thu, Jul 30, 2015. It has the following qualities: sharp and aching. The patient describes the severity as 8/10, with 10 being the worst imaginable. The problem is made worse by movement and standing.

(Joint Exhibit 1, page 1) Dr. Perrin performed x-rays, diagnosed a lateral malleolus closed fracture and instructed claimant to follow up with an orthopedist. (Jt. Ex. 1, p. 2) He provided medications and some type of CAM boot and crutches. Mr. Flaherty was unable to continue working. His wife drove to Iowa to pick him up and return home.

Mr. Flaherty established medical care with Seth Sherman, M.D., at the University of Missouri Health System. Dr. Sherman treated him conservatively. (Jt. Ex. 2, p. 7) He prescribed a walker, ice, elevation, compression and gentle range of motion. He instructed claimant to continue wearing the boot. Mr. Flaherty remained off work and continued to follow up with Dr. Sherman through November 2015. His last visit was on November 13, 2015. He attended physical therapy in October 2015. (Jt. Ex. 4) The records demonstrate that Mr. Flaherty continued to have symptoms throughout this period of time. The following is documented at his last visit:

> The patient is well known to us, 3 months status post injury. He has no tenderness over his fracture site and good ankle range of motion. He has gone back to full duty at work in his ankle support brace. He is taking no medications. At this point, I do think he can safely be placed at maximum medical improvement. He understands that his x-ray shows he is not fully, radiographically healed, but will likely heal over the next few

> months. He can work full duty with no restrictions. All questions have been answered. He can discontinue his brace over the next several months as tolerated.

(Jt. Ex. 2, p. 29)

On November 29, 2015, Charles Mooney, M.D., reviewed the medical records and provided a medical opinion that there was no permanent functional impairment. (Jt. Ex. 5) He did not see the claimant at this time.

Mr. Flaherty was evaluated by Richard Rattay, M.D., in 2017. He prepared a report on February 27, 2017. (Claimant's Ex. 1) Mr. Flaherty reported to Dr. Rattay that he still had a stinging pain which comes and goes all around his ankle. (Cl. Ex. 1, p. 2) Dr. Rattay performed a variety of range of motion tests and a thorough examination. "He has mild limitation in hind foot motion on the left compared to normal motion on the right." (Cl. Ex. 1, p. 4) He also noted mild swelling. After a comprehensive review of the medical file, Dr. Rattay opined the following:

> Mr. Flaherty sustained a Weber A left ankle lateral malleolus fracture July 30, 2015, as described above. In my opinion the subject incident which occurred that day and is described in detail in the H.P.I. of this report, was the cause of his left ankle injury. The injury occurred as a result of and during the course and scope of his employment driving a truck for Van Wyk, Inc.

(Cl. Ex. 1, p. 7) He recommended some additional treatment and some medical restrictions. He assigned an impairment rating of nine percent of the left leg primarily for loss of range of motion. (Cl. Ex. 1, p. 10)

On March 26, 2018, Dr. Mooney prepared a report for defendants. Dr. Mooney opined that he could not provide any opinion as to the accuracy of Dr. Rattay's rating because his range of motion measurements did not correspond to the measurements in the medical file. (Defendants' Ex. A, p. 4) It is noted that Dr. Sherman had found claimant had full range of motion in November 2015. (Jt. Ex. 2, p. 29) It is unclear from this record exactly what measurements Dr. Sherman took at that time.

Mr. Flaherty eventually left employment for Van Wyk and has worked for other trucking companies. He works without restrictions and is able to perform all aspects of his job as a trucker.

The greater weight of evidence in this record is that claimant's left foot and leg never fully recovered to 100 percent. He suffered a Weber A left ankle lateral malleolus fracture July 30, 2015, while working for Van Wyk. He was treated conservatively and with a high degree of success, however, Mr. Flaherty's credible testimony, combined with the report of Dr. Rattay is more convincing than the defense expert, who never

even saw the claimant in person. While his functional disability is minimal, his left foot and leg are clearly not as good as they were prior to the injury, as documented in Dr. Rattay's examination. Dr. Sherman's own records confirm this to some degree in that, at the time of the last visit he noted that radiographically, his fracture was not completely healed.

CONCLUSIONS OF LAW

The only question submitted is whether the claimant has suffered any permanent functional loss to his left leg or foot, and if, so, how much?

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).

The medical experts in this case disagree. For the reasons set forth in the findings of fact, I find Dr. Rattay to be more credible. I find that the claimant has met his burden of proof that his work injury is a cause of permanent functional disability in his left foot and leg.

Where an injury is limited to a 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 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).

Thus, 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 Iowa 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).

The parties have stipulated that any disability is calculated to the left leg under Iowa Code section 85.34(2)(o) (2015).

The disability in question is to Mr. Flaherty's left leg. It does not, in any way, extend into his body. While there was initially a claim that the injury aggravated a condition in claimant's knee, the claimant was not seeking compensation for a knee condition at the time of hearing. As such, compensation is dictated by Iowa Code section 85.34(2)(o) (2015). Industrial disability concepts are not applicable in this case.

The AMA Guides to the Evaluation of Permanent Impairment, 5th edition, has been adopted as a guide for determining an injured worker's extent of functional disability. 876 IAC section 2.4. In making an assessment of the loss of use of a scheduled member, however, the evaluation is not limited to the use of the AMA Guides. Lay testimony and demonstrated difficulties from claimant must be considered in determining the actual loss of use so long as loss of earning capacity is not considered. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420, 421 (Iowa 1994); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). This agency has a long history of recognizing that the actual loss of use which is to be compensated is the loss of use of the body member in the activities of daily living, including activities of employment. Pain which limits use, loss of grip strength, fatigability, activity restrictions, and other pertinent factors may all be considered when determining scheduled disability. Bergmann v. Mercy Medical Center, File Nos. 5018613 & 5018614, (App.

March 14, 2008); Moss v. United Parcel Service, File No. 881576 (App. September 26, 1994); Greenlee v. Cedar Falls Community Schools, File No. 934910 (App. December 27, 1993); Westcott-Riepma v. K-Products, Inc., File No. 1011173 (Arb. July 19, 1994); Bieghler v. Seneca Corporation, File No. 979887 (Arb. February 8, 1994); Ryland v. Rose's Wood Products, File No. 937842 (Arb. January 13, 1994); Smith v. Winnebago Industries, File No. 824666 (Arb. April 2, 1991).

I find that Dr. Rattay's rating of 9 percent of the leg is the best estimate of Mr. Flaherty's loss of left leg function. Nine percent of 220 equals 19.8. Therefore, claimant is entitled to 19.8 weeks of compensation at the stipulated rate commencing on October 19, 2015.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay the claimant nineteen and eight-tenths (19.8) weeks of permanent partial disability benefits at the rate of five hundred twenty-one and 30/100 dollars ($521.30) per week commencing on October 19, 2015.

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

Costs are taxed to defendants.

Signed and filed this 12th day of July, 2019.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.