BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAN LOUKAITIS,

Claimant,

vs.

MENARD, INC.,

Employer,

and

ZURICH INSURANCE,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 5052710

ARBITRATION DECISION

Head Note Nos.: 1802, 1803.1, 3202

STATEMENT OF THE CASE

Dan Loukaitis, claimant, filed a petition in arbitration seeking workers' compensation benefits against Menard, Inc., employer, Zurich Insurance, insurer, and the Second Injury Fund of Iowa, for an alleged work injury date of March 9, 2011.

This case was heard on September 9, 2016, in Des Moines, Iowa. The case was considered fully submitted on September 30, 2016, upon the simultaneous filing briefs.

The record consists of claimant's exhibits 1-9, defendants' exhibits A-M, and claimant's testimony.

ISSUES

Whether the injury is scheduled member as opposed to industrial;

Whether the injury is a cause of permanent disability and, if so,;

The extent; and

Whether claimant is entitled to Second Injury Fund benefits and, if so, the amount of benefits.

STIPULATIONS

The parties agree that the claimant sustained a work related injury on March 9, 2011. The claimant was entitled to some amount of healing period benefits, entitlement to which is no longer in dispute. While the parties disagree as to the nature and extent of claimant's disability, they agree that if permanent disability benefits are owed, the commencement date for permanent benefits would be April 20, 2012.

While the defendants submitted exhibits on rate, the parties stipulated at hearing that the claimant's gross earnings were $495.88 per week and that he was single and entitled to 1 exemption. Based on those foregoing numbers, the weekly benefit rate is $317.78.

Prior to the hearing, claimant was paid 55 weeks of permanent partial disability benefits for a total of $16,750.80.

FINDINGS OF FACT

Claimant was a 62-year-old person at the time of the hearing. His educational background consists of a high school diploma and some community college at Iowa Western. His past work history includes automotive work, which involved all aspects of collision repair as well as hiring and training and supervising 13 full-time employees, working with insurance companies, vendors, and industry personnel; farming, concrete work, landscaping. (Exhibit G, page 1)

He began working for defendant employer in 2009 as a forklift operator. His tasks included receiving shipments, palletizing products, and prepping shipments out of the distribution center. The distribution center he worked in was quite large, extending over a half mile long with over 160 dock doors.

Claimant left the employ of the defendant employer on March 4, 2014 due to unsafe work conditions. There were non-English-speaking team members who were operating the forklift and claimant felt unsafe. (Ex. F, p. 6) For a brief time, he worked at Agri-Drain but since January 2016, he has been self-employed in a landscaping/greenhouse operation.

When claimant was 21, he suffered a motorcycle accident and sustained a left femur fracture. It was repaired with plates, screws, and a metal rod which were subsequently removed. It left him with some residual left lower extremity weakness and limp. He had a partial knee replacement in 2004 from which he fully recovered. He was treated for back pain during that time period with facet rhizotomies. (Ex. E, p. 6)

In the mid to late 1980s, claimant suffered a skydiving accident after a partial malfunction of a parachute. He suffered three compressed fractures. No treatment was recommended and claimant sufficiently recovered to return to skydiving.

On March 9, 2011, he was showing a trainee how to print shipping labels when he became pinned between two forklifts. The trainee went to summon help and 911 was called. He was initially taken by Shelby Fire and Rescue to Mercy where he was seen by Roy Abraham, M.D. (Ex. 1, p. 2; Ex. 2, p. 18) He suffered a trimalleolar ankle fracture and right medial laceration and a displaced tibial plateau fracture and medial condyle fracture of the femur in the right knee. (Ex. 2, pp. 1, 14-15) Surgery took place on the same day including open reduction and internal fixation of left ankle, debridement of laceration, washout and suturing of laceration on the right knee. (Ex. 2, p. 18) Claimant was discharged on April 15, 2011, to a skilled nursing facility, Myrtue Medical Center, in Harlan. (Ex. 2, p. 23) Later, it became evident claimant had sustained a displaced Hoffa fracture which necessitated another surgery. This took place on March 26, 2011. (Ex. 2, p. 26) He had follow-up care with Dr. Abraham through Miller Orthopaedic. (Ex. 4)

Ultimately, claimant was sent home with a wheelchair. Living by himself, claimant was required to take care of his own wheelchair transfers. He would dismount from the wheelchair and maneuver up and down his stairs on his buttocks. He continued to undergo therapy at Cass County Memorial Hospital in Atlantic, Iowa using transportation provided by the defendants. (Ex. 5)

Claimant transitioned through a series of casts. He was returned to work on June 27, 2011, with restrictions of sitting duty only for four hours a day. (Ex. 4, p. 10) The restrictions were changed and on September 6, 2011, he was returned to work with no squatting restrictions for four hours per shift. (Ex. 4, p. 13) During a September 22, 2011, visit with the therapist, claimant exhibited the following:

> ASSESSMENT: Currently: The patient was instructed on a home program of stretching and strengthening. He received further stretching and strengthening here in the clinic and also balance training and work training.

(Ex. 5, p. 6)

He was upgraded to full duty on September 23, 2011, four hours per shift. (Ex. 4, p. 17) He continued with physical therapy, working on mobility and strengthening. By December 2, 2011, Dr. Abraham believed claimant had reached the maximum range of motion he would be able to achieve. (Ex 4, p. 21) He had excellent range of motion in the left ankle, ability to bend the right knee to about 115 degrees with full flexion. (Ex. 4, p. 21)

On January 20, 2012, claimant reported back pain, right knee pain, and continued reduced range of motion in the right knee. (Ex. 6, p. 2) Christopher Anderson, D.O., recommended a course of physical therapy and continued the Tramadol prescription. (Ex. 6, p. 2) The claimant's back pain was continuing and he worried about his ability to return to full duty work, full-time. "The patient is considering the possibility of maybe going to part-time rather than continuing to progress his hours back to full-time." (Ex. 6, p. 5)

On January 26, 2012, claimant returned to physical therapy with complaints of right knee and low back pain. (Ex. 5, p. 8) He had tenderness in the erector mass of the back from the upper lumbar to the mid thoracic on both sides. He also had pain when he bent his right knee. (Ex. 5, p. 8) The therapist observed that claimant walked "with a vaulting style gait and collapse on the left in stance phase on the left. He does not fully extend his right knee on stance phase of gait." (Ex. 5, p. 8) Some of the gait issues were attributable to a true leg discrepancy because the right leg was (and still is) 3 cm longer than the left. (Ex. 5, p. 8) Claimant was provided a heel wedge to even out the length of his legs. (Ex. 5, p. 8) The therapist recommended additional therapy, which was approved.

On March 2, 2012, claimant returned to Dr. Abraham, reporting little pain in the ankle or knee but now having back problems. He had reduced range of motion in the right knee, flexing from 0 to 110 degrees and exhibited a "nice gait." (Ex. 4, p. 23) Dr. Abraham determined that he had reached maximum medical improvement (MMI) and gave him restrictions of 6 hours, need to flex and extend knee and ankle every 30 minutes to an hour. (Ex, 4, p. 23)

On April 9, 2012, he was discharged from therapy. (Ex. 5, p. 11) The therapy discharge notes that he was working full time with no back pain, a slight limp and reduced range of motion.

On April 20, 2012, Dr. Anderson found claimant at MMI for his back pain and other work related injuries. He made the following recommendations:

> 1. It is my medical opinion to within a reasonable degree of medical certainty that this patient is now at maximum medical improvement as it pertains to his work-related injuries of 03/09/2011.
>
> 2. As for restrictions, this patient has been working at a part-time full duty status. I do believe he could work at 8 hours per day if he so chose. I would not put any permanent restrictions on his time tolerance for work. The patient admits that he is doing lots of work at home on his greenhouse after work hours.
>
> 3. Concerning impairment rating, I would be more than happy to provide a permanent partial impairment rating upon formal written request.
>
> 4. Concerning future medical needs, the patient continues to require some chronic pain medications. He is using tramadol and over-the-counter Aleve at this time and it is estimated that he will continue to use these medications over the next six months to one year's time frame. I otherwise do not foresee any further diagnostic studies or therapeutic interventions now or in the future.

(Ex. 6, p. 8)

At the request of the defendants, Dr. Anderson issued an opinion letter assigning a five percent impairment of the lower extremity for the tibial plateau fracture and no impairment for the ankle given claimant's good recovery. (Ex. D, p. 1)

On October 16, 2012, claimant was seen by Devon D. Goetz, M.D., for ongoing, persistent right knee pain.

> Since the time of his injury, he has had some persistent pain in his right knee. He complains of decreased range of motion, persistent pain and stiffness. He notes some difficulty with walking and what is described a consistent limping. He states he "feels uncoordinated while walking and not able to ambulate with a fluid motion." Since that time, he has returned to work full time in September 2011 as a fork lift operator at Menard's. He has had to modify certain activities with work. He states he is no longer able to squat or kneel for longer periods of time and often lies on his back to complete duties that he used to be able to perform squatting or kneeling. He also has some increased stiffness and pain in his right knee with prolonged sitting on the fork lift. His pain is controlled with tramadol 50 mg BID and Tylenol 500 mg two q.h.s.
>
> He continues to work 32 hours per week at the same job he had when he was injured. He still has a stiff and sore right knee and also some stiffness in his left ankle. He previously saw a rehab specialist in West Omaha for an impairment rating due to his injuries of a left fibular fracture with ORIF repair, right knee intraarticular fracture with ORIF repair, and right calf laceration. He did not previously get one from Dr. Abraham.

(Ex. 7, p. 1)

Dr. Goetz concluded claimant would need a total right knee replacement "that was at least accelerated by the injury, if not caused by the intra-articular fracture." (Ex. 7, p. 3) Dr. Goetz wrote a letter to defendants with the following impairment rating.

> For the right knee, based on the AMA's Guides to the Evaluation of Permanent Impairment, fifth edition, page 544, table 17-31, his moderate right knee osteoarthritis currently accounts for a 20% impairment because of the right lower extremity, which equals an 8% impairment of the whole person. This is because he has approximately 2.0 mm. of cartilage interval remaining.
>
> Unfortunately, that will progress over the next few years and reach the point where it accounts for a 50% impairment of the lower extremity or a 20% impairment of the whole person. If that is treated with total knee replacement and he has a good result, then that would leave him with an ultimate impairment based on table 17-33, which is 37% of the lower extremity or 15% of the whole person.

(Ex. 7, p. 5)

Claimant was seen on November 12, 2014, by John D. Kuhnlein, M.D., at the request of the claimant. (Ex. 8) Claimant reported constant pain throughout the right knee and problems with squatting. He described weakness in that the knee would give way every two weeks. He also described pain, reduced range of motion, and numbness in the left lateral ankle and dorsal foot. (Ex. 8, p. 7)

During the examination, claimant walked with a rolling gait. He exhibited the ability to partially squat and had reduced range of motion in lumbar front flexion, right side bending and left side bending. He had sensory decrease to pinprick sensation in the left medial midfoot in the left lateral malleolus scar. Straight leg raising was to 90 degrees bilaterally but there was no finding of radicular pain. (Ex. 8, p. 10) He had reduced range of motion in his right knee along with mild crepitation. On the left side, he had good range of motion with the left knee but some MCL laxity. (Ex. 8, p. 10) The left leg was at least 2 cm shorter than the right, which Dr. Kuhnlein attributed to an old injury. (Ex. 8, p. 10)

Dr. Kuhnlein assigned 11 percent lower right extremity impairment and 17 percent lower left extremity impairment based both on the left ankle and the knee. (Ex. 10, pp. 11, 16) For the low back, Dr. Kuhnlein felt a 2 percent impairment of the whole person was appropriate. (Ex. 8, pp. 11 – 12) The combined values would be 11 percent for the whole person. Dr. Kuhnlein agreed with Dr. Goetz that claimant would need a total knee replacement in the future. (Ex. 10, p. 13)

Another IME was performed, this time at the request of the defendants. (Ex. 9) The examination was performed by Michael J. Morrison, M.D., and was for an evaluation of the right knee and left ankle. (Ex. 9, p. 2)

> His examination reveals that he is 5'10" and weighs 160 pounds. He walks without a limp. On his opposite left knee he has a well-healed arthrotomy incision. No swelling. Flexion is to 130 degrees. Inspection of his right knee reveals no effusion today. He has full extension. Active flexion is to about 115 degrees. No medial or lateral instability. No joint tenderness medially. Inspection of his left ankle reveals a well-healed incision along the distal left fibula. There is a palpable screw head distally. His dorsiflexion of his ankle is to 0 degrees, plantar flexion 20 degrees. No instability. X-rays were not made available so we proceeded with obtaining standing AP x-rays of his knees and x-rays of his left ankle. These x-rays showed his unicompartmental knee replacement on the left in good position with no complicating factors and some early medial joint space narrowing involving his right knee. His ankle x-rays revealed a previous open reduction internal fixation of his distal left fibula fracture with a distal screw migrating.

(Ex. 9, p. 3) Dr. Morrison did not believe the lower back complaints were related to the March 9, 2011 injury given claimant's significant lower back history with multiple vertebral fractures and treatment in 2004. (Ex. 9, p. 4) As far as other impairment ratings, Dr. Morrison agreed with Dr. Kuhnlein's assessment.

DISCUSSION: To address your specific questions:

1. In regards to your question on impairment ratings, he has been evaluated by Dr. Anderson, a physiatrist here in Omaha, and was given 5% impairment to his right lower extremity and 0% to his left ankle. He then saw Dr. Goetz in Des Moines and was given 20% impairment to his right lower extremity and 15% to his left. He then saw Dr. Kuhnlein and was given 11% impairment to his right lower extremity and 12% to his left lower extremity. Utilizing the AMA Guidelines, Fifth Edition, as requested, Table 17-33, it would be my opinion that the impairment rating for undergoing open reduction internal fixation of a mildly displaced medial condyle fracture would be 12% impairment to the right lower extremity, and for undergoing open reduction internal fixation of his distal left fibular fracture this would be 20% impairment to the left lower extremity. The whole body impairment translation would be 5% whole body impairment to his right lower extremity and 6% whole body impairment to his left lower extremity which equals 11% whole body impairment.

(Ex. 9, p. 3)

CONCLUSIONS OF LAW

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

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).

Claimant's primary assertion is that his back pain stems from the work injury, specifically the time spent in the wheelchair along with gait issues. Defendants point to claimant's past history of complaints including three compression fractures suffered in a skydiving incident in the 1980s and a more recent motorcycle accident in 2004.

Since 2004, claimant has had occasional back pains, none of which were serious enough to necessitate treatment. Defendants argue that if claimant did suffer an aggravation of a pre-existing condition, the pain resolved in 2012. Claimant did not mention back pain after 2012 until the independent medical evaluation (IME) with Dr. Kuhnlein in 2014. However, during the examination with Dr. Kuhnlein, claimant walked with a rolling gait and exhibited reduced range of motion in the lumbar spine. Claimant's left leg is at least 2-3 cm shorter than the right, which is not attributable to claimant's injury.

Dr. Morrison concluded that claimant's back pain is more consistent with previous injuries suffered in the 1980s and 2004. However, claimant worked heavy duty labor along with labor that required significant bending, twisting, and stooping without complaint or restrictions from 2004 until 2011. In 2011, claimant sustained serious injuries to his right knee and left which necessitated two surgeries, a significant period of being wheelchair bound during his recovery, and gait issues related to his work injury.

In 2012, the therapist observed that claimant walked "with a vaulting style gait and collapse on the left in stance phase on the left. He does not fully extend his right knee on stance phase of gait." (Ex. 5, p. 8)

Claimant is an individual who lives a vigorous and active lifestyle. He was able to set aside a skydiving injury within a short time. He is not the type to seek medical assistance when little other than palliative care can be offered. In one medical note, Dr. Anderson advised claimant of the importance of continuing medications to allow claimant more time to heal. (Ex. 3) The evidence supports a finding that claimant sustained a serious injury which resulted in gait issues. Those gait issues caused claimant to suffer back pain which plagues him today.

He testified credibly that he continues to have ongoing pain in his back. Not one doctor suggested claimant was malingering, and there is no evidence in the records of that either. Based on the opinion of Dr. Kuhnlein, claimant's testimony, claimant's past behavior following his 2004 injury, and then again his current work injury, it is found that claimant's work injury resulted in back pain.

Because the claimant's work injury is industrial in nature, entitlement to Fund benefits is not appropriate.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 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, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant is currently working for himself in a landscaping business where he built a greenhouse, plants and sells perennials, does some landscaping such as the planting of trees and shrubs. He has not returned to full-time work since his injury. It is anticipated that he will need a total knee replacement arising out of his work injury, but he has not yet undergone that surgery. It is possible that as claimant's knee condition worsens, his industrial disability may increase, but the case at hand must be decided on the current picture, not a future, anticipatory picture.

Claimant has not looked for work outside his landscaping business. His landscaping business requires him to bend, twist, stoop, and lift. Being self-employed allows him to pace himself, stretch and move when needed. The impairment ratings assessed have been varied:

Doctor	Right Lower	Left Lower	Whole Body
Dr. Anderson	5%	0%	
Dr. Goetz	20%	15%	20%
Dr. Kuhnlein	11%	12%	11%
Dr. Morrison	12%	20%	11%

When released to full duty work on March 2, 2012, Dr. Abraham recommended that he work 6 hour shifts with breaks approximately every 30 minutes so that claimant could flex and bend his knee and work on his ankle. (Ex. 4, p. 23) Dr. Anderson believed claimant could work 8 hours and that claimant had been doing "lots of work at home on his greenhouse after work hours." (Ex. 6, p. 8) Dr. Kuhnlein recommended only activity modification subject to claimant's knee concerns. (Ex. 8, p. 13)

Claimant is a hard worker, an active person, and one who appears to have a fairly high tolerance for pain. He has a high school education and significant experience in the auto repair business. He is capable of driving a forklift and some assembly or machinist work. He also owns his own landscaping business.

While most of claimant's work history in the past involved activities requiring bending, stooping, squatting and lifting, it appears from his current physical activities that he is capable of much of the same activities, albeit requiring time to stretch, flex, bend, and rest his knee and ankle. Subject to all the foregoing, it is determined claimant has sustained a 25 percent industrial disability.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of three hundred seventeen and 78/100 dollars ($317.78) per week from April 20, 2012.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 20th day of December, 2016.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/srs

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.